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OVERSIGHT HEARINGS ON SECTION 404 OF THE CLEAN WATER ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

NINETY-NINTH CONGRESS

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OVERSIGHT HEARINGS ON SECTION 404 OF THE CLEAN WATER ACT

THURSDAY, JULY 31, 1986

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room SD-406, Dirksen Senate Office Building, Hon. John H. Chafee (chairman of the subcommittee) presiding.

Present: Senators Chafee, Symms, Durenberger, and Burdick.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. I want to welcome everybody here this morning. This is a hearing of the Subcommittee on Environmental Pollution, on section 404 of the Clean Water Act.

This is the fifth in this subcommittee's efforts over the past year or so to assure effective implementation of the Section 404 Program for protection of the Nation's wetlands.

On the face of it, it would appear as though we have made some progress through this oversight process. Since the most recent hearings on September 18 of last year, the agencies represented here today have negotiated a new memorandum of agreement governing additional review of district engineer's permit decisions. They have signed an agreement to clarify, that is the Department and EPA, regulations of accidental and waste disposal discharges in wetlands. They have clarified jurisdiction over isolated wetlands.

One of the things that we want to do here today is to look to see how these agreements have actually been implemented. All too often the agreement that was apparent on paper is interpreted differently by each party when it is put into practice. I will say at the outset that, frankly, I am disturbed to hear that Army has sent guidance to its field people on how to interpret the new MOA, and the agreement on fill material without seeking EPA review or concurrence. These agreements attempted to resolve longstanding disputes between Army and EPA and were reached only with great difficulty. The members of this subcommittee can attest as well as anyone to the degree of that difficulty. We had, as I mentioned, some four or five hearings on that subject, trying to push Army and EPA into a conclusion of those MOA's.

Given the history of problems with the MOA and definition of fill material, I think it highly improper for either agency unilater-

ally to provide interpretations of key provisions or terms within the agreements on those aspects of the 404 Program. To do so without the other agency's concurrence undermines any progress that might otherwise have been made.

Army's guidance on these two agreements prove my point. Their interpretation of consultation with EPA, which is required by the new MOA, is that the corps must explain to EPA that their views were understood and considered. The corps' district offices are expressly informed that the MOA is not intended to resolve or negotiate differences in controversial points. Army did not check with EPA before sending this narrow reading of the agreement to its field offices, it is my understanding. I doubt that EPA ever would have agreed to such an interpretation. Are they now to provide their own interpretation? Are they now to provide their own interpretation of the new MOA to their field offices? Where does that leave us? Surely not with a workable agreement between the two agencies.

The same thing happened with the agreement on field material. Army unilaterally sent guidance to corps districts stating that EPA will use its general enforcement powers under section 309 of the Clean Water Act to issue administrative order for proposed waste disposal activities, as well as for illegal discharges. Again, I doubt that EPA would agree that this method of handling proposed waste disposal discharges was part of the agreement that it signed.

The agreement seems to say that a permitting mechanism under 404 or 402 would be used to evaluate any proposed waste disposal fills. But EPA, of course, was never given the chance to review or approve such an interpretation. EPA is now left with a choice of letting stand what is probably an illegal use of section 309 or of issuing contradictory guidelines to its field people.

Given the other serious substantive problems with the fill agreement, which I will reserve for questions later, I have to wonder whether, in fact, any progress has been made in controlling waste disposal in wetlands in the past 15 months. I hope what I hear this morning from our witnesses will convince me otherwise.

The other, and perhaps more compelling reason for having today's hearing, is to examine several pivotal issues in the implementation of the Section 404 Program which have surfaced since last fall.

Of foremost concern to me and other members of this committee is the integrity of the so-called water dependency test, which is laid out in the EPA's 404(b)(1) regulations. This test is the keystone of the 404 Program. For projects that don't need to be in or near water, the test establishes a strong presumption that there are less environmentally damaging practicable alternatives to filling wetlands that would fulfill the project's same basic purpose.

The demonstration that no less damaging practicable alternatives exist is the threshold 404 permit requirement for nonwater dependent projects, which must be met before any other considerations, such as mitigation or public interest review, come into play.

This is the heart of the matter. EPA regulations say that an alternative project site need not be owned by a particular 404 permit applicant in order to be considered practicable if the site could reasonably be obtained and would fulfill the basic purposes of the

project proposed by the applicant. I believe that this means that in some cases, to be practicable, does not have to be available to any particular applicant so long as the alternative is available to someone to fulfill the basic project purpose.

The availability of alternatives to wetland development and the determination of a project's purpose often must be considered from the broad perspective of the public, rather than the narrow view of the applicant. To do otherwise in every case would provide an incentive for developing wetlands. It would put the Federal agencies in the inappropriate position of having to become deeply involved in the financial affairs of an applicant and its competitors, and would create inequities for responsible developers who select nonwetland sites. We will get into this further in the questions.

In his February 20, 1986, guidance to district engineers, the corps' acting chief counsel agreed that there was a requirement for a broad perspective in considering project alternatives and purposes. He reminded the districts that "the 404(b)(1) guidelines also call for consideration of purpose and need from the public's viewpoint, and consideration of alternatives which may not be available to the particular applicant."

Yet, on April 6, 1986, Mr. Dawson instructed his subordinates to rescind and reverse this interpretation of the 404(b)(1) guidelines. He did so with no prior review or concurrence by EPA, which after all is the Agency charged with promulgating these regulations. On April 22, 1986, the corps' district offices were duly notified that the earlier interpretation of EPA's guidelines was rescinded and that Army's position "requires that alternatives be practicable to the applicant and that the purpose and need for the project must be the applicant's purpose and need."

In other words, in considering practicable alternatives, you don't have to consider solely what the applicant has available. It may be that somebody else owns that site and can build a shopping center on it. It doesn't have to mean that that alternative site is available to that particular applicant. That is what the acting chief counsel of the corps said on February, which was sent out to all the districts.

On April 16, Assistant Secretary Dawson instructed his subordinates to rescind and reverse this interpretation of the 404(b)(1) guidelines. He did so with no prior review of concurrence by EPA, which after all is the agency charged with promulgating the regulations. On April 22, the corps district offices were duly notified that the earlier interpretation of EPA's guidelines was rescinded and that the Army's position was "requires that alternatives be practicable to the applicant and that the purpose and need for the project just be the applicant's purpose and need." That is an extremely narrow interpretation and a great deviation from the prior guidance.

I find both the process and substance of Mr. Dawson's policy change unacceptable. With one unilateral stroke of the pen, he has ordered an interpretation of EPA regulations that threaten to continue the effectiveness of the 404 Program.

In my region of the country, for instance, the New England Corps Division notified its staff, after having received the reversal of the prior February direction, having received the reversal that

came in April from Mr. Dawson, the New England Corps said, "this important change in use of the 404(b)(1) guidelines means that the permit denial based on the alternative test will not be likely."

This policy direction has been in effect since April without EPA's concurrence. Once again, EPA was left with the choice of letting this interpretation stand, or issuing a contradictory interpretation or vetoing permits approved by the corps based on this erroneous interpretation. In the meantime, any damage that might be caused by Mr. Dawson's interpretation continues.

To me there is a deeply disturbing pattern here. It is apparent in the interpretation of the guidelines, in the interpretation of the agreements I discussed earlier, and in the development of the mitigation policy, which I will discuss later. It is a pattern of unilateral action by the Army, with only after the fact notification or consultation with EPA.

Section 404 is not an Army program. It is an Army-EPA program. Like it or not, Congress set up section 404 in the Clean Water Act as a program jointly administered by Army and EPA. That is what Congress did. Army is responsible for the day-to-day administration of the Permit Program, and for enforcing permit conditions and limitations. The program's environmental standards are developed by EPA in conjunction with the Army. EPA also has ultimate administrative authority for determining what waters are within the jurisdiction of the program, and what types of farming, ranching and forestry activities are exempted under section 404(f).

EPA can restrict or prohibit the filling of any wetlands, even where the corps approved a permit for the activity, if there would be unacceptable adverse environmental consequences. EPA approves and oversees administration of the 404 Program by the States and is responsible for taking enforcement actions against unpermitted discharges.

If any agency, then, has the statutory authority to interpret broad questions of how the 404 Program should be implemented, it is the EPA, and not Army. At the very least, Army should obtain EPA's concurrence before making such interpretations. In many cases, the Clean Water Act requires Army to defer to EPA as the ultimate authority, not the other way around.

Let me just say finally on a more positive note that one area where I would hope that the two agencies here today could find some common ground rather easily is in developing a program to educate the public and particularly State and local officials about the requirements of the Section 404 Program and its importance in protecting the many benefits that we enjoy from wetlands. If I could encourage both of you to undertake that effort, I think it would help the program run smoothly and efficiently.

Finally, let me just say that there isn't a witness who comes before this committee that doesn't start off by stating the importance of the wetlands to this Nation, and they are alarmed over the disappearance of those wetlands. Every witness that we have dealt with has said that, and has recognized that it is official policy of the country to be concerned over the wetlands.

It is, after all, one of the reasons that this program was passed. But it does us no good to pay lipservice tribute to the importance of

the wetlands in the whole chain of life unless we do something about it. I have deep concerns over the way the program has been developed over the last several months particularly, and the guidance that has gone out.

Senator Symms, we are delighted that you are here. If you have a statement, this would be a good time for it.

Senator SYMMS. Mr. Chairman, I don't have a statement this morning. I look forward to hearing from the witnesses and then I will have some questions to ask. I welcome both of you here this morning, and look forward to hearing your statements.

Senator CHAFEE. As I notified both witnesses, I believe, in advance, we are going to start with Mrs. Jennifer Joy Wilson, Assistant Administrator for External Affairs, U.S. Environmental Protection Agency. Why don't you start, Mrs. Wilson.

STATEMENT OF JENNIFER JOY WILSON, ASSISTANT ADMINISTRATOR, FOR EXTERNAL AFFAIRS, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mrs. WILSON. This is my first opportunity since my confirmation to appear before your subcommittee to review the Environmental Protection Agency's responsibilities under section 404 of the Clean Water Act. As the Agency's national program manager for the 404 Program, I believe the course we pursue today will help to determine, in a very fundamental way, the kind of environment we leave to future generations of Americans.

Senator, I am one of those witnesses who agrees with you that it is important that we reflect upon the underlying cause for the losses of wetlands as we seek to better protect them. The lesson, you will recall, from Garrett Hardin's description of the "tragedy of the commons" capture the essence of the problem.

Like the individual shepherds grazing their sheep on the commons until the field is destroyed from overgrazing, wetlands can be considered a national commons providing a variety of services and helping to sustain the quality of lakes, streams, and estuaries. Because of scientific uncertainties in assessing the cumulative impact of losses, decisions based on individual cases do not always allow us to understand the effects of wetlands destruction or alteration to our resource base as a whole. Like Hardin's shepherds, we all stand to lose as a result.

This is a problem that we, as environmental managers, must address. I view our role as protecting our water resources so we can sustain the values wetlands provide not only for immediate use, but also for the needs of the generations that will follow us.

How do we bring more consistent administration to the program as it is presently structured? EPA has a five-point strategy, and those points are: (1) taking advantage of our authorities with respect to the 404(b)(1) guidelines specifically; (2) continuing to encourage cooperative efforts between the agencies to interpret those areas where there may not be agreement, such as wetlands delineation methodology, enforcement, and mitigation; (3) improving public information about wetlands values and Federal jurisdiction; (4) conducting research on cumulative impacts, mitigation, and

water quality; and (5) encouraging State assumption of the Section 404 Program.

In this regard, EPA is pursuing with the corps anticipatory mechanisms for protecting wetlands to supplement our role in reviewing permits. One such approach is the advanced analysis of wetlands. Its objective is to provide prospective permit applicants, local and State government planners with an early indication of the suitability or unsuitability of the specific wetlands for various kinds of section 404 regulated activities. It typically involves participation by local, State and other Federal agencies.

Senator CHAFEE. Mrs. Wilson, could you withhold for a moment. I have a statement here that you submitted, and I am trying to follow it.

Mrs. WILSON. I am sorry, Senator, I am using a shortened version. You have my full statement submitted for the record. I will be glad to give you a copy of the shortened version.

Senator CHAFEE. Do you have a copy of your shortened version?

Mrs. WILSON. Yes, sir.

Senator CHAFEE. Maybe Senator Symms would like one, too. We will put your full statement in the record.

Mrs. WILSON. Thank you. I apologize for the confusion.

Senator CHAFEE. Now I have to catch up.

Mrs. WILSON. I am on page 2, the third paragraph dealing with anticipatory mechanisms.

Senator CHAFEE. All right, why don't you proceed.

Mrs. WILSON. The objective of these anticipatory mechanisms is to provide prospective permit applicants, and local and State government planners with an early indication of the suitability or unsuitability of specific wetlands for various kinds of section 404 regulated activities. It typically involves participation by local, State, and other Federal agencies with significant community involvement, including interest groups and concerned citizens.

The advanced identification process offers several advantages over the individual permit process. It provides predictability to the regulated community, and the permit process will proceed more smoothly. It can help us to better achieve our Clean Water Act objectives by increasing knowledge to the anticipated levels of protection needed for our most important water resources. It allows for more systematic consideration of how the ecological functions of individual wetland areas interrelate on a larger scale, and cumulative impacts can be better considered, although we still need better scientific techniques to accomplish this.

EPA is in the early stages of developing our program and has initiated about a dozen such efforts across the country. We are also pleased with the cooperation and support we are receiving on these projects from the Corps of Engineers, the Fish and Wildlife Service, and State and local agencies. We are encouraged by the response of interest groups, affected developers, and the public. With their support, and with yours, the use of this approach to wetlands protection will become an important part of the Section 404 Program.

I would like now to turn to a number of specific developments which affect the implementation of the Section 404 Program and about which this subcommittee has specific interest.

The interim agreement between EPA and the Department of the Army on the regulation of solid waste has been in effect since April 23, 1986. The objective was to develop a common definition of fill material which would clarify whether such discharges were to be regulated under section 404 or section 402, which is the National Pollutant Discharge Elimination System [NPDES] permit program.

We agreed to an interim permit for addressing solid waste discharges as the first step toward an ultimate solution to this problem. The main focus of the agreement is to ensure an effective enforcement program against unauthorized discharges of solid wastes into waters of the United States. Permitting of some solid and semisolid wastes under the NPDES Program, and EPA's expanded responsibilities for enforcement under the agreement, raised new regulatory issues for EPA and delegated States.

To ensure these responsibilities are handled in an environmentally effective way, EPA has established a task force of headquarters and regional staff. The initial meeting of the task force was held in early June, with participation by all 10 EPA regions, as well as representatives from the Army and the Corps of Engineers.

Four EPA work groups were established at that meeting to cover jurisdictional issues, enforcement, water quality criteria for wetlands, and State oversight. Each work group includes regional representatives so that we can ensure that our efforts to improve our regulatory program for solid wastes will work effectively in the field.

In addition to these program development activities, EPA and corps field staff have been coordinating on a number of specific cases involving solid waste discharges, and enforcement actions are being initiated as appropriate.

Another issue that arose at last year's hearings held by the subcommittee concerns isolated waters. I can now report, Mr. Chairman, that Army and EPA are at this time operating with similar guidance on jurisdiction in isolated waters. We are now reviewing a draft Corps of Engineers guidance on isolated waters and preparing comments on it. If these comments are addressed by the corps, we will propose that the guidance be issued jointly by both agencies to our respective field offices.

We are also working toward a joint scientific methodology for determining wetland boundaries. We will review the Corps' final revisions, now underway, to its draft multiple parameter approach methodology and hope to integrate it with EPA's draft methodology so that a joint approach can be developed and final guidance can be issued.

The Department of the Army has forwarded its draft final consolidated rule to OMB, and at this time we are reviewing the draft to assess revisions made in response to EPA's most recent comments transmitted to Army by letter of April 23, 1986.

I have provided you with a copy of the entire final determination on the Attleboro case for the record. I am, of course, pleased to answer any questions that you may have on my decision.

This year, EPA is conducting research to address three particular areas where we believe we can make significant scientific progress. These are: understanding the role of wetlands in main-

taining water quality; evaluating cumulative effects of wetland losses; and assessing the effectiveness of techniques to mitigate wetland losses. We hope that EPA's contribution to our scientific understanding of wetlands will benefit all who make decisions affecting their use and functions.

In conclusion, Mr. Chairman, the agency's commitment to wetlands protection is significant. We are broadening our attention to wetlands and we are increasing our focus to protect as many valuable wetland resources as we can. By working with other Federal agencies, the States, the regulated sector, interest groups and the public, we can provide better protection of the Nation's wetlands for now and for the future.

I will be pleased to respond to any questions that, of course, you may have regarding my testimony or any other Section 404 Program issues.

Thank you.

Senator CHAFEE. Thank you very much, Mrs. Wilson.

When Army issued its April 22 guidance, interpreting the practicable alternatives analysis, was that with prior review with you and your concurrence?

Mrs. WILSON. No, sir.

Senator CHAFEE. Do you think that that was appropriate?

Mrs. WILSON. No, sir.

Senator CHAFEE. Have you told them that?

Mrs. WILSON. Yes, sir.

Senator CHAFEE. Is it EPA's position that that guidance from the corps headquarters should be rescinded pending further discussions with your organization?

Mrs. WILSON. Senator, I wrote Mr. Dawson a letter, dated July 29, 1986, requesting that practicable alternatives' availability to the applicant, particularly as interpreted by Mr. Lawless in the Army Corps of Engineers' New England Division, be corrected. I will be glad to submit a copy of that letter for the record.

I indicated in my letter, if I may quote, sir:

> EPA would not agree that the guidelines should be interpreted in such a manner, and believes Mr. Lawless interpretation, if allowed to stand, is inconsistent with the practicable alternatives test. Even non-water dependent applicants could easily, using Mr. Lawless interpretation, design their project criteria so as to result in only that wetland being suitable for the purpose of their project. Obviously, the water dependency test, and indeed the 404(b)(1) guidelines in their entirety clearly require scrutiny of the "basic" or "overall" purpose of the applicant's project, as well as the applicant's specific project criteria, in determining practicability of alternatives.
>
> You have assured me orally several weeks ago that you would review Mr. Lawless memorandum. In the interest of smoother administration of our respective responsibilities under section 404 of the Clean Water Act, I would appreciate your clarification and correction of Mr. Lawless interpretation to ensure proper guidance to our field staffs.

Senator CHAFEE. So Army go ahead goes ahead and sends out its interpretation without consulting you, and that has gone out now. Where do we stand? What happens next?

Mrs. WILSON. I anticipate a response from Mr. Dawson to my letter, and I am very hopeful that we will be able to clarify the matter. I further agree that interpretation of the guidelines is the lead responsibility of the Environmental Protection Agency.

Senator CHAFEE. Mr. Dawson wrote you and congratulated you on your Sweeden's Swamp decision, saying that he agreed with your interpretation of the practicable alternative, the limitation on it. Could you explain your answer to that?

Mrs. WILSON. Senator, I was concerned that his letter subsequent to my Attleboro decision, in the context of the April 28, 1986, memorandum by the Army Corps of Engineers on practicable alternatives, would be misconstrued by our field staff. Because that guidance from the corps could have been misintepreted and because EPA would not agree with it, after extensive consultation with EPA counsel and others, I requested Mr. Dawson's correction.

Senator CHAFEE. As I understand cases like this, Army is to consult with EPA before sending out its directives in matters like this.

Mrs. WILSON. Specifically, under the 404(q) MOA and as a result of the long negotiation on every single word in the MOA itself, we did agree that we would consult each other before any guidance was sent out, and that did not occur.

Senator CHAFEE. In your interpretation of the practicable alternative, which I believe your specific language says, "from the applicant's viewpoint," doesn't that create an incentive for wetlands development?

Let's get your language here.

Mrs. WILSON. From the Attleboro decision, sir?

Senator CHAFEE. In your decision in the Attleboro case. I am referring back now to the language that Mr. Dawson congratulated you on.

"I agree that availability to the applicant is the correct test to apply in this case." This is on page 20 of your decision. "However, I still conclude that, on the record, the North Attleboro site must be deemed available to Pyramid." Would you explain what you mean by that?

Mrs. WILSON. Yes, sir.

Senator CHAFEE. Let me just say, to start off with, we are dealing with extremely important matters here in which precedents are being established. I agree with your conclusion in that case, and I applaud you for it. I congratulate Mr. Deland also for his original action, and for your support of him.

I was worried about that particular language, "availability to the applicant is the correct test to apply in this case." You left yourself some wiggle room there. Why don't you proceed to tell us what you meant?

Mrs. WILSON. Senator, in making my final determination, after reviewing nine boxes of the administrative record, meeting with the applicant, the Corps of Engineers and others who were interested in this case, and undertaking extensive review and consultation with legal counsel, it was my opinion that I should decide this matter on a case specific situations at hand. It was my intention to prevent precedent from being set in this case that would in any way damage the water dependency test, how we interpret mitigation and when mitigation is appropriate.

I made the decision in this case but refrained from addressing policy issues beyond the case specific situation presented. Indeed, my decision was intended to uphold policy and to prevent any deleterious interpretations of the 404(b)(1) guidelines. In the conclusion,

I believe I mentioned that it would not be appropriate to set any precedent for allowing artificial wetlands to be considered as compensatory mitigation for the avoidable loss of naturally functioning wetlands.

Senator CHAFEE. I will ask Mr. Dawson questions along the same lines, but let me just set the case that we will be talking about. I am not tying this to the Attleboro case, I am citing it as a case.

There is a swamp that is available, presumably at a lower price, but there is a more expensive piece of land that somebody owns. All land is owned by someone, and both of these are owned by the nondeveloper in this case, one is a swamp, and one is an area suitable to build a mall on. If the swamp is filled, that would make a nice mall, too.

The applicant buys the swamp and says, "I would like to build a mall here." Under the interpretation that Mr. Dawson is placing on it, you look at it from the applicant's point of view, and you say, under his interpretation, is there a practicable alternative for the applicant. If party X owns the other site, not the applicant, the interpretation readily could be that the applicant doesn't have a practicable alternative. He doesn't own the other piece of land. What is your answer to that?

Mr. DAWSON. Mr. Chairman, if I may say, that would not be my interpretation, if you give me a chance to answer.

Senator CHAFEE. You will have a chance to answer, or to rebut.

Mr. DAWSON. Thank you very much.

Senator CHAFEE. I have read your directions that you sent out, and you will have a chance, you will have your day in court.

This is the matter that we are dealing with. This is the heart of the problem. What is the practicable alternative? You look at it from the applicant's point of view, what the applicant has, or do you look at it from a practicable alternative that somebody can build on the other site. It may not be the applicant's, he doesn't own the other site. Maybe it is party X who will decide that he will build it.

How would you interpret that situation?

Mrs. WILSON. Senator, at the time that an applicant is evaluating options for purchase, before he applies for a permit, or before he decides which site to purchase for development, that is the time when EPA considers it necessary for the applicant to examine practicable alternatives.

In the Attleboro decision, and in my letter to Mr. Dawson, I think it is very clearly stated that EPA considers "basic purpose" or "overall" project purpose to be very distinct from what an applicant says is their specific design criteria.

An applicant may design a project and state that it must be a three story mall, that it must be sited by these two specific interstate connectors, and that it must have an exact proximity to housing and so forth, thus being designed for exactly one particular wetland site. We would not agree with that. We, in fact, believe that it is the Government that must decide if there is a practicable alternative as opposed to the applicant.

Senator CHAFEE. I am going to give Mr. Dawson a chance, and we will reserve the questions. Unless Senator Symms has a ques-

tion specifically to you, I think we will move ahead with Mr. Dawson, and then we will have a chance to ask you both questions.

Senator SYMMS. Just one brief question. My understanding is that EPA turned down the application for the shopping mall to be built. Isn't that correct?

Mrs. WILSON. Yes, sir.

Senator SYMMS. On this replacement or alternative, isn't there a section of the law that allows for the applicant to provide some replacement mitigating wetlands, or something?

Mrs. WILSON. After it has been determined under the 404(b)(1) guidelines that the least environmentally damaging practicable alternative has been selected, we then try to mitigate any remaining unavoidable impacts to wetlands. I didn't find that the destruction of Sweeden's Swamp was unavoidable. The guidelines require avoidance to the extent practicable and this is particularly important in view of the uncertainty of the science of manmade artificial wetland creation. This scientific uncertainty did not allow me to find that it could be used as equivalent compensatory mitigation where the loss of a natural and functioning wetland, which provided excellent wildlife habitat was avoidable.

Senator SYMMS. This is all privately held land.

Mrs. WILSON. Yes, sir, I believe it is, but it is within the jurisdiction of the Federal Government under the Clean Water Act as waters of the United States.

Senator SYMMS. I guess all I can say, Mr. Chairman, is that it is a good thing that we got as much of the country developed as we did before we got into this kind of business. I would like to hear what they both have to say.

Senator CHAFEE. I am not sure that I agree with your conclusion. There is plenty of opportunity to develop land. We don't want people zeroing in on wetlands, and wetlands are as important out in your area.

Senator SYMMS. It is important, but my understanding is that we can make some new wetlands somewhere else, and I guess that really is what this question is about. That is basically the question, whether or not it is possible for technology to replace the wetlands.

Mrs. WILSON. One of the reasons, Senator, that we are focusing on the science of mitigation in our research program at EPA is to try to get answers like that. We need to better understand whether the techniques to adequately substitute, create, and mitigate for unavoidable losses of wetlands can be achieved. However, at this point, we have not reached a state of scientific certainty that enables us to find a one-for-one exchange scientifically appropriate.

Senator CHAFEE. All right, Mr. Dawson, we welcome you here. Why don't you proceed. Do you have a summary of your statement, or how do you intend to proceed?

We have a statement here from you. Is that what you intend to work from?

Mr. DAWSON. Mr. Chairman, with your permission, what I would like to do, in light of the words that have already been spoken, would be to ask your permission to submit that in its entirety, and then just briefly touch on a few points that have already been raised.

Senator CHAFEE. That is fine. Why don't you proceed. We will put your entire statement in the record.

STATEMENT OF HON. ROBERT K. DAWSON, ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

Mr. DAWSON. Thank you very much, Mr. Chairman, and Senator Symms.

We do appreciate the opportunity to be with you and to discuss the 404 regulatory program. I think that it might be useful, very quickly, to mention what I would term a status report on our program.

The Corps of Engineers critically evaluates over 12,000 applications each year. Most of these applications are by mom-and-pop private property owners. Corps evaluations result in modification to minimize the impact of well over half of all applications.

The Corps of Engineers must carefully balance, because the Congress has told it to, the competing interests of a wide variety of individuals and groups regarding resource use, and resource protection. The corps resolves the vast majority of conflicts at the field level. Only a handful, Mr. Chairman, of these 12,000 proposed projects result in any intense controversy which gains national attention.

My point is that I think the program is working and working well. The corps' regulatory program is staffed largely by professionals, two-thirds of whom hold degrees in the natural sciences. These men and women do an outstanding job, in my judgment, day to day in this very difficult balancing act that I have mentioned.

I want to quickly mention a few environmental protections which have been added to the program in the last 5 years. We have more stringent conditions on all nationwide permits, which I know this committee has been interested in. Individual permits are now required for many more activities in the head waters and isolated waters. Third, the resource agency comments are assured careful consideration by the 1985 MOA's that were scrutinized very carefully by this subcommittee.

The regulatory reforms and the program overall have been designed to result in a better managed program, while retaining the high quality decisions and environmental safeguards.

If I may, Mr. Chairman, I would like to address one of the main points, I believe, in your opening statement, which was not listed as one of the areas we were to address, but which is certainly a very appropriate area of discussion.

You mentioned, and I believe your words were "pattern of unilateral action." I want to very strongly disagree with that characterization. I believe that the pattern of relationships between the Army and the EPA, while I won't maintain that it is perfect, I don't think that it is possible to attain that, I do believe that there have been many examples of good, close coordination between the two agencies.

I could mention a proposed regulatory guidance letter on isolated waters, the proposed regulatory guidance letter on alternatives, the coordination on 404(f) ditching in Minnesota. We have coordinated closely on all litigation, and we are working closely on wetland de-

lineation. Those are just a few that I was able to jot down as you were speaking.

Another area that you raised was the availability to the applicant of practicable alternatives. You characterized the Army's position as extremely narrow and a great deviation. I would respectfully disagree with both of those characterizations. Our policy is, I believe, in line with court decisions. The policies of those court decisions, perhaps, should be debated, but I don't believe that what we have done is a deviation from those decisions.

You mentioned as well that our decisions, I am not sure exactly which ones, but some of our decisions threatened the continuation of the program. Again, I don't believe the record supports that, and I would submit that while there may be examples where, as a result of this hearing and others, we will all agree changes could be made, but I don't believe the evidence is there that the program is not working, or that there is any examples that can be cited of wholesale or, for that matter, less than wholesale environmental injury. If there is, we would certainly want to hear it, and we would take prompt and effective action accordingly.

To conclude, Mr. Chairman, I would say that we are all concerned about wetlands, as you mentioned before. I think many statements have been made here rightly of the importance of wetlands. One point that we do need to keep in mind, according to a study by the Congress' Office of Technology Assessment, over 80 percent of the wetland losses in this country are beyond the reach of the 404 program, and I think that we do all need to continue to work to find ways to diminish the wetland losses.

One that I would like to mention, that is pending in the Congress right now, I know you have been a leader in supporting that, Mr. Chairman, is the imposition of cost sharing and user fees on water project construction. I would submit that legislation like that will do as much as anything I am aware of to curtail the loss of wetlands, as we find smaller and fewer water projects as a result of legislation like that.

In conclusion, Mr. Chairman, I welcome the opportunity to go into some of these matters more in detail. I have not attempted to address all of the issues that your opening statement raised, but I trust we will have an opportunity to do that later.

Thank you very much, Mr. Chairman.

Senator CHAFEE. Thank you, Mr. Dawson.

I would say, in that Office of Technology Assessment report that you referred to, it said that 80 percent of those losses are due to agriculture. Many of those agricultural conversions, as you know, are covered by 404; namely the clearing of bottomland hardwoods, which we have had some disputes on.

Furthermore, I think the point you make is a good one. If some of them are beyond the reach of 404, that means, in my interpretation, that we have to intensify our protective efforts under 404 to save the 20 percent, to save what we can. I don't think it means that, because some of it is beyond our reach, therefore, we shouldn't be just as vigilant and, indeed, more vigilant in protecting those that are within our reach.

Again, I recognize the comments you made about the cost sharing. I appreciate your support on that, and the support of the ad-

ministration. We have passed that legislation in the House and the Senate. As I understand now, it is in conference, and there is an excellent opportunity to achieve that cost sharing. I appreciate the support that you have given and the impetus you have given to that whole effort of cost sharing. I think that it will cause those entities who wish to build dams, channels, or some water project to give a second thought if that entity has to pay for some of the cost of it.

Let's get to the problem that really brings us here, and the one I wish to concentrate on, and that is the application of the 404(b)(1) guidelines, getting right down to the practicable alternative. When the *Louisiana Wildlife Federation* case was decided, your counsel, on February 20, interpreted that, he is a professional lawyer, in the following manner:

> District Engineers should be mindful that the 404(b)(1) guidelines also call for consideration of the purpose and the need from the public's viewpoint, and considerations of alternatives which may not be available to the particular applicant.

Just so that everybody will understand the situation we are discussing, not a specific situation, but how this language applies. The question before the House is, When an applicant comes before you, seeking a permit to fill a wetland, do you look at it narrowly?

What are the alternatives for this applicant, and for the type of facility that he wants to build. Is it to be a shopping center, that is three level, that is next to three interstate highways, with parking for 1,000 cars?

Or, do you look at it from the broader point of view: is there available for somebody the capacity to build a shopping center, where it does not meet these particular specific requirements of being next to two interstates and parking for a thousand cars, and so forth? That is the question.

Your counsel, on February 20, sent out the guidance to your folks in the field.

> Guidelines call for consideration of purpose and need from the public's viewpoint, and consideration of alternatives which may not be available to the particular applicant.

Following that, this apparently came through the chain to Major General Hatch, who, in essense, said to you:

> We are going to send this out, and it appears that you concurred with this on January 21. Is this really what you want to do?

You said, on April 16:

> This responds to your request of April 15, seeking my approval of the proposed letter to the field, clarifying chief counsel's letter. I do not concur in sending the letter as drafted. I would make it clear that we have already reconsidered our position. Army's position is clearly that it requires the alternatives be practicable to the applicant, and that the purpose and need for the project must be the applicant's purpose and need. Any definitive Government position must be coordinated with the Environmental Protection Agency. I plan to conduct that coordination with the firm position stated above.

I plan to coordinate, but the coordination is going to be along my ground rules. This is signed Robert K. Dawson.

So this goes out. Reference is made, and so forth, and General Hatch sends it out.

> The guidance that we sent out before has been reconsidered and is hereby rescinded. Our position is that it requires the alternatives to be practicable to the appli-

cant, and the purpose and need for the project must be the applicant's purpose and need.

This comes down through the chain of command. This is the interpretation that the New England Division said. They note the receipt of the letter.

This important change in the use of the 404(b)(1) guidelines must take place immediately. The effects of the change will be easier for an applicant to rebut the presumption that alternatives are available for nonwater dependent fill. The applicant's financial goals alone may make other alternatives not practicable * * *.

and so forth.

That is your intepretation of this. You say that I have been harsh in proposing what you sent out. First of all, you didn't coordinate it as required by the act. We just had testimony that it wasn't approved by EPA. How could you get a more narrow interpretation is beyond me.

Mr. DAWSON. Senator Chafee, the narrowness of that, we could certainly discuss. It is the court's decision, not mine, that we ought to say is too narrow, because all we were attempting to do there was pending resolution between Army and EPA, and that effort is underway, that we had to have a position to handle those thousands of permits that continue to flow in the doors of the corps whether or not we have all of the issues resolved.

It was our belief that pending further discussions, we should use existing law, and that is my concern about the characterization as narrow, because I would submit to you that it was our intent, and I believe that we carried out that intent, to stick with the existing law pending the kind of consultation that I believe you have mentioned.

To get to the substantive issue, though, that you have raised, how this actually is implemented in the field and what is the impact of it being implemented that way. First of all, we do believe very strongly that you have to look to have this program work, to have it function day to day, you do have to look at what is practicable for the applicant, because to go beyond the applicant and look for any person anywhere is simply a matter of proving a negative, which is an impossibility, and still be able to have the program function day to day, and do the job that the Congress has asked us to do.

Where I do agree with you, though, wholeheartedly, Mr. Chairman, is that the applicant's characterization of that practicability, the applicant's characterization of his project purpose is not the ruling call. The district engineer must make the decision himself on whether another alternative site is available. We don't maintain, and the court decisions, as you know, don't maintain that the applicant has to possess, at the time of the application, the site, but it does have to be reasonably available to the applicant.

I would submit to you, sir, that we would need nearly every single Federal employee that is on the rolls right now if we had to look at every alternative for any applicant, real or imaginary, future, past or present. So from the standpoint of the deviation, I would submit to you that the great deviation would have occurred if we had suddenly said to our field people, without coordination with EPA, you are to begin looking at any future possible applicant, rather than at the applicant that you have before you, and

have the data and the capacity to make a judgment on whether that applicant can find another site to use.

Senator CHAFEE. Mr. Dawson, let me just say, this is completely contrary to what your counsel said. Your counsel says, in his memorandum, "The *York* decision," the brief, and so forth, "do not alter the practice and policy that we currently have. We should be mindful that the guidelines call for consideration of the purpose and need from the public's viewpoint and consideration of alternatives which may not be available to the particular applicant." So it is you who are changing the situation.

Furthermore, there is a pattern in here, and you and I have discussed this many times, that you are zeroing in on these wetlands. Let me just say that it is odd that you should take not only this case, but interpret it so narrowly, when there have been other appellate court decisions which you have not chosen to circulate in this fashion. I am referring to *Reed* v. *Marsh,* the *Riverside Bayview Homes,* and the *Avoyells* case.

How do you explain not coordinating with EPA?

Mr. DAWSON. Mr. Chairman, if I may, before I answer that, let me just state quickly, in response to your point, that there are other decisions, not just the *York* decision, but we believe that the preponderance of those cases consistently have held that we do have to look at the applicant's ability, not any other individual.

I want to say, too, that we still have a very difficult hurdle that the applicant has to get over, and I remind the committee again that well over half of the applications that come in do get altered, not to suit the applicant, but changed in a way that may not allow the maximization of the use, but factors in the environmental sensitives.

To go to your direct question about coordination, it was our belief then, and it continues to be our belief, that all we were doing was restating the existing practice and making it clear what was the corps policy in the face of decisions which no doubt raised a lot of questions in the minds of our field people.

In the meantime, we are coordinating and do intend to coordinate. My April 16 letter indicated, as you were kind enough to point out, that any definitive government position, certainly any change of position, must be coordinated with EPA. That process is, in fact, underway.

Senator CHAFEE. My time is up, but let me just say, first of all, that those on the receiving end say, "this important change." You are the one that changed things, and they noted it. "This important change," upon receipt of your limited interpretation that you sent out, "requires the alternatives to be practicable to the applicant, and the purpose and need for the project must be the applicant's purpose and need. When that went down to the lower echelons, Mr. Lawless said, in sending out to his people, "this important change," he noted that it was an important change. Then, as you noted that you are going to coordinate, "I plan to conduct that coordination with the firm position stated above." It doesn't show much flexibility in trying to coordinate.

Mr. DAWSON. Mr. Chairman, if I might quickly, the Lawless memo that you have referred to a number of times, if I might make a couple of points quickly about that. One is, that is certainly

one member of our 28,000 employees who chose to interpret the correspondence in that way. We believe that he interpreted it incorrectly.

Mrs. Wilson has taken us to task on his interpretation of that, I think quite rightly. She took us to task on his interpretation, and I have a letter, which Mrs. Wilson has not seen, responding to her letter of a few days ago, in which I state unequivocally that Mr. Lawless' characterization of what the communication stated was incorrect.

My point is that I would hope that one individual field interpretation would not be taken as the way that all field offices were interpreting that guidance.

Senator CHAFEE. We could go back and forth on this.

Senator Symms.

Senator SYMMS. Thank you very much.

Mr. Chairman, maybe Mr. Dawson's firm position is just good leadership on his part, on the bright side, and that will help him work out the resolution.

I want to ask a question with respect to the 404 Program. If I heard your testimony right, Mr. Dawson, you said that there are very few of these projects that involved unresolved conflicts out of the thousands that are applied for. Is that correct?

Mr. DAWSON. Yes, sir, that is correct, and I think that it is an important point, Senator Symms, because the concern I have is that the impression might go forth from this hearing today, or at any point, that the Army Corps of Engineers and EPA, and all the other players are not doing a good job in carrying out the law and the regulations.

The fact that you just mentioned, I think, says that while it may not be perfect, when we are handling 12,000 of these a year, and trying to balance all of the concerns that the Congress has told us to balance, which are certainly the important environmental concerns, but also private property rights, and other concerns that the Congress has also told us to look at, that the record of the number that emerge as disagreements between Army and EPA, or for that matter, Army and anyone on the outside, is very small.

Senator SYMMS. With respect to that, I am one who is strongly in favor of the administration's efforts in regulatory reform. Are you telling us here that we are making progress on that? I hope that we are not getting bogged down, in other words.

You have cut down the number of days, I understand, that it takes to get a response to an applicant, from 150 to 70 or something.

Mr. DAWSON. Yes, sir.

Senator SYMMS. How many hoops do people have to jump through, maybe that is a question that I need to ask both of you, in this whole process of applying for a permit?

In the concern over wetlands being destroyed, how many hoops does a person have to go through?

Maybe you will want to comment on that, too, Mrs. Wilson.

Mr. DAWSON. If I might, first, going back to the premise your question was based on, we have made some progress in the regulatory reform arena, and I think that we have done it without sacri-

ficing the environmental standards that the Congress set, and that our own regulations set.

To answer your question precisely, the hoops or steps that a person has to move through to get a permit are very extensive, indeed, not only are they very extensive, but the public has an opportunity at every step of the way to involve themselves and raise, quite rightly, environmental concerns. Just to mention a few of those, the applicant has to not only satisfy the Corps of Engineers, but the three Federal resource agencies get a crack at everyone of those 12,000-plus permits.

The State in which the permit is located has to provide a State water quality certification on every single one of those 12,000-plus applications. So any State, in effect, has a veto over any of those actions simply by denying the State water quality certification.

We could talk as well about the other laws, the NEPA laws, the Endangered Species Act, and a number of other acts, all of which have to be complied with on every single one of these applications, and none of that has changed, and there is really no capacity to change any of that because those things are in the law and in the regulations.

Senator SYMMS. If I could pursue this further by how this is working out. Any of these regulatory programs can be subject to a challenge in court. How often is there a challenge in court of a decision you have made with respect to 404?

Mr. DAWSON. That is the point I should have raised.

Senator SYMMS. When you are challenged, are you winning or losing the cases?

Mr' Dawson. Well, sir, as you said, the courts are always available. In instances where we are challenged, which are very small in number, and I can give you, for the record, the specific details on this, but I would characterize our record in court, particularly in the last 5 years, as being extremely good, meaning that our decisions are being sustained.

Senator SYMMS. Your decisions are being upheld in court.

Mr. DAWSON. Yes.

Senator SYMMS. Would you concur with that, Mrs. Wilson?

Mrs. WILSON. Yes, sir, I would agree with Mr. Dawson's characterization of the permit process, and so forth.

Senator SYMMS. I have a problem out in Idaho that concerns the wetlands issue.

On the Salmon River, about 18 or so miles down the river from the town of Salmon, there was a mine 100 years ago, and they had an alluvial fan that dumped into the Salmon River. It is a dump creek, manmade, that changed the track of the river, so it backs the river up, and we have several miles of slow water because there is a block in the river, so to speak, and it has backed the water up. When the temperature gets 20 degrees below zero, it starts causing an ice jam, and about every third year, we have a flood in the town of Salmon.

The corps has done a lot of work there with dikes, and so forth. A prudent man's rule tells you what your grandfather would have done 100 years ago, you go down and clean out the plug in the river so that the water can flow on down. Then you don't have the ice jams, and you don't have the problems, and you save the town

from flooding every third year, which costs the Federal Government about $4 million, plus all of the anguish of the people that have their houses flooded.

I saw a picture of a sweet old lady being taken out of her house, where she had 4 inches of ice on the floor of her living room. She was 80 years old. Yet, because of the environmental laws, 404 being one of them, and the wild and scenic river classification, the first roadblock, we can't seem to get any action on this to clean out the dump in the river.

I, frankly, have told the local people, if I were them, I would go down and clean it out myself, and stop asking the Federal Government. They would have it done before the courts or anybody could stop them.

Nevertheless, is there any consideration for what happens if a town is going to be flooded, for example, on these permits, because there is a place where a wetland would be affected if the plug were taken out of the river, the manmade plug that was put in the river, and there would be a couple or three pairs of Canadian geese who would not have their nesting grounds?

Is there any consideration for the negative impacts, like the town of Salmon being flooded, that you could waive the rule?

Mr. DAWSON. Senator, certainly that type of concern that you have articulated very clearly should be factored in, and there are mechanisms in the regulations for a balancing and a consideration of those impacts that might be prevented.

I am not familiar with all of the details of the case that you mentioned. If the Wild and Scenic Rivers Act is a factor——

Senator SYMMS. It is classified as a wild and scenic river, and how that ever happened is beyond me also.

Mr. DAWSON. The point that you are making is a good one. It seems to me that there have to be mechanisms to factor in those concerns that you have raised, as well as looking carefully at the environmental concerns. To look at one doesn't mean that the other has to be diminished at all, but it means that there has to be some balancing done, which gets into some of the other areas that we have talked about.

Senator SYMMS. What I am getting at is, I know that there is an environmental side of these responsibilities, but it seems to me that the corps and EPA both have a responsibility on the resource use, and on the developer's side of this issue, too, because, as I said at the outset, if we had applied the environmental laws to our society 100 years ago that we have today, we would not have gotten a third of this country developed.

It has become so difficult to get through all these hoops that sometimes I am amazed that anybody even makes the attempt. They risk literally their fortunes to try to develop something, and then to just be turned down by a government agency and some person in the government agency who does not have a risk involved, and doesn't have anything to lose if the application is turned down, but the investors may have everything to lose. It seems to me that there are two sides to this.

So I would hope, as one member of this committee that we can move forward with this regulatory reform. I think that it was one of the better things about the election of the President in 1980 and

his reelection in 1984, the fact that we are going to try to get rid of some of this needless bureaucracy. I would hope that we could do that through a commonsense application. I can see it everywhere in my State where we have gone overboard in the name of any type of nondevelopment attitude, and have everybody bogged down to where they can't get anything done.

I think I have asked all of the questions that I need to pursue. I didn't really give you a chance, Mrs. Wilson, to answer that first question about the wetlands and how many steps. Do you want to comment on that?

Mrs. WILSON. I agree with Mr. Dawson's response on that, sir.

Senator SYMMS. As a general statement, you think that the corps is doing a reasonably good job of the wetlands protection?

Mrs. WILSON. The statistics correctly indicate that only a very small number of cases end up being contentious and attain nationwide visibility.

Let me also say, Senator, I am pleased so far with how the 404(q) memorandum of agreement between Army and EPA has been working. We have only had one elevation to headquarters under that memorandum of agreement since September when that agreement was signed. It involved a case in California, which did result, through the elevation process, in the adverse effects on wetlands being reduced, and increased mitigation resulting. I was quite pleased to see the process work as well as it did with a minimum amount of time being lost.

Senator SYMMS. Thank you very much.

Thank you, Mr. Chairman.

Senator CHAFEE. Senator Durenberger.

Senator DURENBERGER. I would like to ask a question of both of you about regulatory reform, and moving into the future. I would say, from my State's viewpoint, the corps has always been basically sensitive to wetland problems. There have been different ways to demonstrate that sensitivity as it relates particularly to not only individual landowners, but the relations with local government. So I don't come here with a specific constituent.

I would like, though, to have you give me some indication of where this long-term solution to solid waste disposal may be at today, or where we are headed in this cooperative effort between the two of you.

As I understand it, subtitle (d) of the 1984 Solid Waste Disposal Act, last year, in effect, it says that under the Clean Water Act we are going to be moving a lot of this issue to the States over some period of time, and that your two agencies have the responsibility for laying the groundwork for transferring the regulation of solid waste disposal to the States.

What I am trying to explore is where you are today, where you are headed, what do you see to be some of the potential problems, some of the concerns that you might have as far as it relates to securing wetlands when this program is implemented on a State-by-State basis.

Mr. DAWSON. Thank you, Senator Durenberger.

You go ahead.

Mrs. WILSON. Senator, we have an interim agreement on the definition of solid waste as fill material with the Army, which has

been in effect since April of this year. EPA has put together a task force of headquarters and our regional staff, and including Army Corps of Engineers representatives. We want to ensure that as we work through the issues that we are consistent with each other and can include the States' perspective. In fact, we have several subgroups of that working on jurisdiction, State input, and so forth.

This is an interim agreement for several reasons. Under subtitle D of RCRA, EPA is doing a survey to examine solid waste practices, criteria, and recommendations for improvement. That survey should be completed in about another 18 months or so. We wanted to review that survey.

In addition, we wanted to have the experience of working with this interim agreement, which sets out criteria which indicate when prospective applicants should look to section 402 and when to look to section 404, and use that experience in considering how to come to a final definition of "fill" material.

I think that it is certainly a step in the right direction. It will benefit our enforcement efforts where, because of jurisdictional disputes, we have not had the certainty that we now achieve in the interim agreement as to which agency's permit was the one that should have been sought or should be sought if one proposes a fill in a special aquatic site.

Mr. DAWSON. Senator, I might just add that I think that this is one of the success stories. It is an incomplete story because we are still working, as Ms. Wilson has said. This agreement between the two agencies, with the subcommittee's active involvement, we were able finally in January to sign the agreement that I think moves us far and away toward being more effectively able to deal with these on an interim basis, as you suggested, until the States and other mechanisms can trigger in.

Senator DURENBERGER. Do you have some responsibility—I am not fully familiar with when this transition ought to take place, or how it ought to take place. Are you helping the States lay the groundwork for this point in time when the responsibility has shifted from the Federal level to the State level for solid waste?

Mrs. WILSON. Under section 402, the NPDES Permit Program, we are working with the States to examine the criteria and standards they have that could be triggered, and to see how this can be accomplished. If problems are identified, we are optimistic that we can work them out. We don't know fully all the answers to your questions, but we are certainly working in that direction.

Senator DURENBERGER. Are they on this task force thing that you were talking about earlier?

Mrs. WILSON. Our regions are consulting with the States on the task force. I am not sure if there is actual State membership on that task force, but certainly the whole reason we have the task force is to make sure that this is an implementable objective. We are working with the States directly.

Senator DURENBERGER. Is there a timeframe for the implementation of this transfer that you are aware of?

Mrs. WILSON. As far as NPDES permits are involved, it was triggered at the time that the interim memorandum of agreement took effect, which was in April. There are certain cases going on right now where we are working with specific States on specific in-

stances. On a more general level, we are working with all the States on how to implement the agreement.

Mr. DAWSON. Senator Durenberger, I might add that when we were wrestling with how to resolve this, we were pleased to see that some States did seem to have a growing capability to address this problem. Certainly, I would be in favor of anything that we could do to assist that process and move it along.

Senator DURENBERGER. Thank you very much, Mr. Chairman. I thank you very much.

Senator CHAFEE. Thank you, Senator Durenberger.

Senator Burdick.

Senator BURDICK. Thank you, Mr. Chairman.

Mr. Dawson, I regret that I didn't hear your opening statement because I had a conflict. We are quite busy at times.

I would like to ask one question. Under the sharing of authority between the corps and the EPA over the 404 Program, you indicated that there was some improvement in relations, if not, what relations can be improved?

Mr. DAWSON. Senator, I think that overall the relationship between the Army and EPA is extremely good. It is not to say that there are not plenty of times when we disagree, and I believe that that is built into the law and the regulations because our respective missions on 404 are different, and I think the Congress intended that there be a clash of thinking on some of these permits each year.

Certainly, we want to continue to work to improve and insure that ultimate and maximum coordination occur. I have mentioned a few areas earlier where we are coordinating. The chairman quite rightly mentioned some areas where he felt we had not coordinated as well as we should, and I think that it needs to be and effort of constant and continued emphasis to make sure that that kind of coordination is there.

Senator BURDICK. Is there any legislative proposals that you have in mind that make the relations more harmonious?

Mr. DAWSON. We don't have any that the administration has proposed, Senator, although I would say that certainly there are a number of changes which I would be willing to supply, for the record, in coordination with Mrs. Wilson, that we think could help in that regard.

Certainly, a simple way, would be to give the authority more to either agency so that you don't have the constant dispute. I am not sure that this is a wise course of action, but that would certainly remove the disputes, but it would also remove possibly some of the balancing between all of the different concerns that come to play, as you well know, sir, on any one individual permit.

Senator BURDICK. I am going to say something radical. Should it be in one agency instead of two this program?

Mr. DAWSON. I think you could argue from an administrative standpoint, Senator, that that would make sense. There are other factors, no doubt, that would need to be considered. Certainly, from the standpoint of arguments and conflict and delays that may be caused by those conflicts there is some merit to that proposal.

Senator BURDICK. Did you say that you had some recommendations?

Mr. DAWSON. Sir, I said, if you direct me to, I would be pleased to give you some ideas that would, I think, diminish the amount of disagreement.

Senator BURDICK. I would be pleased to have your ideas.

Mr. DAWSON. Thank you, sir.

Senator CHAFEE. Let's return to the practicable alternatives, if we might. This was a matter that your counsel, as I said, interpreted and came to his conclusion, namely, the broad view. You then stopped that from going out, and came up with the restricted view.

What I am going to ask you, Mrs. Wilson, what is your reaction to that? You wrote Mr. Dawson on July 29, and you say, "EPA would not agree that the guidelines should be interpreted in such a manner". Why did you refer to Mr. Lawless's interpretation, it is not his interpretation?

Mrs. WILSON. His reaction was so constrictive. Were it to be considered the appropriate interpretation of the field staff in the Army, we would have a very serious disagreement, and I wanted to make that very clear. If the practicable alternatives were limited that severely to an applicant's specific criteria, we absolutely could not agree.

Senator CHAFEE. But, Mr. Dawson, you would agree that that is your interpretation as well, is it not, when you say to the Director of Civil Works, as you did on April 16:

> The Army's position is clearly that the York case requires that the alternatives be practicable to the applicant, and the purpose and need for the project must be the applicant's purpose and need.

You agree with the Lawless interpretation, do you not?

Mr. DAWSON. No.

Senator CHAFEE. You don't agree that it is a change, but you agree that it is very narrow.

Mr. DAWSON. No, Senator, as my letter back to Mrs. Wilson will say, and she hasn't seen that response yet, I don't agree with the Lawless position.

Let me say that my office did review the Robertson February 20 memo that you have alluded to. We did see that, and we approved it going out to the field. It was only after a number of our field offices raised questions about the meaning of that memo that we felt the need to clarify existing policy, not to change it.

The sentence that you have highlighted in the Robertson memo, Mr. Chairman, that says, "Alternatives which may not be available to the particular applicant," there is, in fact, a mechanism for looking at alternatives which are not available to the particular applicant, it is quite proper and it is done by the corps, and that occurs after you have crossed the threshold of the practicable alternative available to that applicant, and you look at the overall public interest, and whether there are enough other shopping centers, or whatever the need of the public is, and we don't take issue with that kind of review at all.

What we felt a great need to clarify, however, was whether the districts, on all of our 12,000 permits, would speculate in a way we didn't feel they had the knowledge and information to do about every possible, conceivable landowner might be able to in the

future or the present, or in the past, the same activity that that applicant is striving to do.

Senator CHAFEE. Frankly, if I were down at the local level, after having these directions from General Hatch:

> Our position is that *York* requires that the alternatives be practicable to the applicant, and the purpose and need must be the applicant's purpose and need.

and then, after all that is done, you can consider the public's good, I don't know where the purpose trying to interpret this would be.

Starting from the point that you make here, from the applicant's point of view, it seems to me that that encourages the development of wetlands because what the applicant does is wait until a thoughtful person gobbles up the other site, and then he comes in, buys the wetland at a low price. Then he says, all right, I wish to build a shopping center. Do you have a practical alternative, you ask. The person says, no, I don't own that other land.

That is looking from my point of view, practicable to the applicant, no, it is not practicable, the price of that other land is much more than what I paid for this swamp. This is the first problem I have.

The second one, you said, "the purpose and need for the project must be the applicant's purpose and need." I say, this is next to two interstate highways, and it is just right for me, where as the other place is removed and not next to the interstate. Besides, you would have to build it multistoried if you are going to have parking for 1,000 cars.

Looking at it from my point of view, the applicant, it is not practical to buy the other place. Second, looking at it from the purpose and need, my purpose and need is a one-story structure with 1,000 cars. Therefore, you give me the permit.

Everything in that scenario favors the person who is irresponsible, who comes in and buys the swamp, and wants it developed.

Mr. DAWSON. Senator, I would disagree with that conclusion, and I would also disagree with the scenario that you just outlined, that that is the way it works.

The way that the process would work is, certainly, the applicant would say, "I don't have that other site," but it is the district engineer's responsibility to decide whether he could reasonably acquire that site, or any other site that that applicant could reasonably be expected to use. If he finds that practicable alternative, whether the applicant owns it or not at the time, then the permit is denied.

Senator CHAFEE. Let's just stop right there.

Mr. DAWSON. Yes, sir.

Senator CHAFEE. Before you were objecting, saying that you can't have your people going out and determining whether he could buy A, B, C, or D.

Mr. DAWSON. No, sir, I didn't say that.

Senator CHAFEE. The more important one is you say in your language, clearly, that the alternative be practicable to the applicant. The applicant says that it is not practicable for him to buy that place over there. I don't want it. I can't afford it. It costs a lot more than this swamp cost.

Mr. DAWSON. But it is the district engineer's judgment, Mr. Chairman, he is required to make a judgment, not accept the appli-

cant's word for it. I believe the record show unequivocally that that is what the corps does. They go through an extensive review of whether there are practicable alternatives.

I agree with you, and my letter back to Ms. Wilson says that Lawless was wrong, dead wrong to say that we listen to what the applicant says, and that this is the end of the story. I agree with you completely, that would be an improper discharge of our responsibility.

The other point you made was that the applicant's purpose was the controlling thing, implying that we, again, would defer only to what the applicant himself said that purpose was. Again, the same standard applies, the district engineer may not accept without question what the applicant characterizes as his purpose, and the same kind of review goes forward.

My last point would be that this decision or this interpretation that we are discussing, and the entire program, does not favor destruction of the wetlands because it is much easier, I think any developer would say, it is much easier to go upland somewhere, where they don't have to deal with 404 or other environmental standards, and build, than it is to build where all of these hoops that Senator Syms asked about have to be gone through. So I don't believe that that result is occurring.

Senator CHAFEE. What you are saying is not far off from what I believe, that we should look at this not solely from the applicant's point of view, but from a broader point of view, from the public's point of view, but that is not what you told your people.

I don't know how you can get that interpretation that you look at other factors besides the applicant, when this is what you say:

> Our position is that the alternative be practicable to the applicant, and that the purpose and need for the project must be the applicant's.

That is what you sent out. How you can interpret that any differently than the way I did is beyond me.

Mr. DAWSON. Let me try it one more time, if I may, Mr. Chairman. What that says, I don't back away from, because that is what the preponderance of the legal decisions has said. What that does not say, that I believe your interpretation has said, is that we accept the applicant's opinion and his judgment and his findings, and that is not what that says.

What that says is that you don't look at other potential landowners, other applicants, and try to get inside their minds and see what is practicable. It does say that the applicant doesn't have to own the land in question, but it has to be reasonably acquirable by the applicant. That is a far cry from saying, whatever the applicant says, whatever his characterization, is what we are going to accept.

Senator CHAFEE. You have told, in your letter to Mrs. Wilson, but we don't have a copy of that, and I don't know whether it has been written.

Mr. DAWSON. Yes, I would be glad to give you a copy.

Senator CHAFEE. In your letter, you are saying, that is really not what you mean, or that should not be the interpretation of it.

Mr. DAWSON. Yes, sir.

Senator CHAFEE. That is your answer to her July 29 letter, "If this is allowed to stand, it is inconsistent with the practical alter-

natives test." You say, no, we don't mean that. Are you going to rescind your guidance, or broaden it?

Mr. DAWSON. Senator, I don't believe that there is a requirement to rescind the guidance. I do agree fully, though, with your point that it needs to be made clearly known that Mr. Lawless' interpretation is not correct, and we will take whatever steps are necessary to make sure that there aren't other folks out there who have interpreted this the same way Mr. Lawless has.

Referring to Mr. Lawless, what I say in the letter to Mrs. Wilson and without reading the whole thing:

> I can assure you that I do not share his views on the practicable alternatives issue. You will be receiving in the near future a proposed guidance letter on this matter for your review and comment. The guidance will make it clear that the guideline's alternative test does not restrict the corps to considering only what the applicant prefers, or to what is the most practicable maximizing alternative. The corps, not the applicant, will decide what is practicable. Similarly, the corps will not automatically accept the applicant's statement of the purpose and need of the project.

That, I believe, Mr. Chairman, from your opening statement, and later comments, is what concerned you the most. I know there were other things that concerned you as well, but the picture that the applicant would walk into the coprs' district office and pronounce, "Here is what is practicable, and here is what the project purpose and need is." I do want to unequivocally say that is not what has ever been done, to my knowledge, and it is certainly not what we intend with the guidance.

Senator CHAFEE. Let's go back to the scenario I suggested. He owns the swamp, and there is another piece of land up there where you could have, not perfect, perhaps, not next to two interstates, but there. Would you consider that is a practicable alternative, he doesn't own that?

Mr. DAWSON. It could be, Mr. Chairman. The district engineer's task in that setting would be to look at whether that site was reasonably acquirable by the applicant, and whether it would meet his project puposes after being scrutinized by the district engineer, and it could go either way. He might decide that that other site, even though it is not owned, it is a practicable alternative, and he would deny the permit, or he might decide that that is not a reasonably available site that would fit the same purposes. Until we could see the details of that——

Senator CHAFEE. Would you take into consideration the fact that the owner of the other piece of land has decided to build a shopping center there, thus accommodate the need, and the other applicant is out in the cold. He owns this swamp, and he would like to have a shopping center, but he clearly can't get that other piece?

Mr. DAWSON. That issue, Mr. Chairman, would be addressed later in the process, when we look at the public interest review, which centers, as you know, on whether or not it is contrary to the public interest for any particular application to be approved.

In the issue of whether he can acquire that property or not, it would not be a factor because, again, whether it is a practicable alternative for acquisition's sake doesn't turn on that issue.

The other point of the project purpose certainly would be a factor, it would seem to me, if the other landowner has already

said, I am going to build a shopping center here, and he has done more than say that, has, let's say, secured the permits, has broken ground, and is starting to build it, then it seems to me that goes a long way to showing that the project purpose would be attainable up there, if the other developer were to say, OK, I will sell this to you, and turn it over to you.

Senator CHAFEE. But before sending out your regulations on this, your final change, are you going to talk to EPA?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. And coordinate with them?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. Coordinate on the basis of your firm position?

Mr. DAWSON. Certainly, Senator, but I believe Mrs. Wilson would say, and you might even say, that my firm positions on things are not always the end result.

Senator CHAFEE. I have never gone as far as to say that, Mr. Dawson.

Mr. DAWSON. Excuse me for suggesting that. Certainly, I do have a belief on this that I don't apologize for, but certainly coordination means that both sides have to be open to the other side's point of view.

Senator CHAFEE. I think that you voice that in connection with the letter that you wrote to Mr. Thomas not quite a year ago, in which Mr. Thomas was going to go forward with his guidelines. You say:

> If interpretation of the guidelines is in dispute, I would suggest that the more appropriate course of action is for the headquarters level of our respective agencies to resolve the issue.

When they proceed, you like coordination. I hope that when you proceed, you will seek the same coordination.

Mr. DAWSON. I think that that is reasonable, Mr. Chairman.

Senator CHAFEE. Now let's get into mitigation. I would like to hear your views on mitigation, Mrs. Wilson.

Mrs. WILSON. Senator, I believe the 404(b)(1) guidelines are sound regarding the water-dependency test. I believe that it is appropriate to consider mitigation after you have gone through, first, attempting to avoid the loss of the wetland; second, trying to minimize the impact of the proposed project; third, trying to repair or rehabilitate that which would still be damaged; fourth, by reducing the impact over time by preservation and maintenance; and finally by then try to compensate, after all of those steps have been gone through, for the remaining unavoidable loss.

I believe that mitigation must be used only for those wetland losses which are unavoidable and which will not cause or contribute to significant degradation.

Senator CHAFEE. Have you ever seen mitigation?

Mrs. WILSON. Yes, sir.

Senator CHAFEE. Would you recognize mitigation if you saw it?

Mrs. WILSON. No, I would have to be told that it was a mitigation effort. I don't think that I would know otherwise.

Senator CHAFEE. Has EPA ever approved mitigation?

Mrs. WILSON. Certainly.

Senator CHAFEE. Have you?

Mrs. WILSON. Yes, sir, as a condition to a permit. Indeed, in a recent case, the Port of Oakland in California, we thought that with increased mitigation there would be adequate compensation for the unavoidable loss of wetlands, and we concurred with the permit issuance.

Senator CHAFEE. Describe mitigation. The only one I am familiar with was the suggestion in the Attleboro case that they take a previous gravel pit and make a swamp out of it.

Mrs. WILSON. In fact, we wanted to clarify mitigation policy in our interim guidance. We refrained from issuing it, however, after we had sent it to Army, Commerce, and Interior, and we received all of their the comments back. At Army's suggestion, we deferred the issuance of that guidance so that we could attempt to issue joint guidance.

What we endeavor to say in that mitigation policy, Senator, is that mitigation has various parameters. It could be the purchase and the holding of a wetland in perpetuity or for a certain amount of time to ensure that that particular wetland habitat was maintained. It could be enhancement of a degraded wetland.

It could be creation of a wetland, and it is with regard to this latter aspect of mitigation that we have the least amount of scientific certainty. It may be years and years to achieve. Depending on the type of wetlands and the type of values, we are unsure that man can create equivalent substitutes for that naturally functioning wetlands, This is why we are conservative in accepting man-made, artificially created wetlands as compensatory mitigation.

Senator CHAFEE. Have you ever done it?

Mrs. WILSON. Senator, I would have to look into that I do not know.

Senator CHAFEE. I don't know of any, but I may be mistaken. When I was referring to mitigation, I wasn't referring to preserving an existing swamp in perpetuity, or possibly cleaning up an existing swamp. I was thinking of the creation of a swamp.

Mrs. WILSON. Yes, sir, however, mitigation does include all of those activities.

Senator CHAFEE. What worries me, Mrs. Wilson, about this whole mitigation thing, is that mitigation might be looked on as an easy way out. Go ahead and fill the existing swamp, we will build you another one.

Mrs. WILSON. I couldn't agree with you more. It concerns me, too.

Senator CHAFEE. I think that we are in dangerous water to suggest that.

Mrs. WILSON. Absolutely.

Senator CHAFEE. To mix my metaphores.

Mrs. WILSON. I tried to make that point very clearly, sir, in my final determination on Attleboro. It concerns EPA greatly if mitigation were ever to be used in that manner.

Senator CHAFEE. I have some comments here which reinforce what you were saying. I understand that you are putting out a guideline now on this, are you not?

Mrs. WILSON. We have endeavored to coordinate or initiate coordination with the Department of the Army on the issuance of joint mitigation guidelines. Administrator Thomas and I have had several meetings with Assistant Secretary Dawson and representa-

tives of the various agencies who have administrative responsibilities with respect to section 404, we have discussed how we might better administer and coordinate our agency's activities, and other agencies' activities for the benefit of the public.

While that was going forward, the Department of the Army placed its own mitigation policy in their consolidated regulations, which are now over at OMB. We commented on those regulations last April and we requested again that the mitigation portion of the regulations be pulled away from the consolidated regulations so that we could continue efforts toward joint mitigation policy.

We have commented on that again to the Department of the Army, and I reference that in my July 29 letter to Mr. Dawson. I hope that we can issue a joint mitigation policy that would also be coordinated with the Fish and Wildlife Service.

Senator CHAFEE. As I understand, your approach is, as you outlined it, it is a four or five step process.

Mrs. WILSON. Yes, sir.

Senator CHAFEE. In which you avoid the impact, you minimize them, or you rectify them, or you reduce them. Then, finally, the last thing is what you might call possibly substitution or creation, and you put that a definite last, which I agree with.

Could you briefly summarize, from your point of view, where you stand with the Corps on the guidelines on this subject?

Mrs. WILSON. This is the guidance that we would like to send out to our regions. It is certainly within our authority to send it out notwithstanding nonconcurrence by the Army. The Army has suggested that we develop joint mitigation guidance, I concur with that, and I would like to proceed with such joint mitigation guidance. I am not sure that we are that far apart. Where I find that we have difficulties with the Army is that their mitigation policy may not be consistent, in our opinion, with the 404(b)(1) guidelines, and we would like to assure its consistency.

Senator CHAFEE. From where you see it, and then, of course, I will ask Mr. Dawson, what is Army's policy on the mitigation?

Mrs. WILSON. The way I read both their current mitigation policy and their proposed mitigation policy in their proposed final consolidated regulation, it is not clear to me that mitigation would only be used for unavoidable loss of wetlands. EPA would like to ensure that it is only used in the case of unavoidable loss as opposed to use for avoidable losses.

Senator CHAFEE. What do you say to all this, Mr. Dawson?

Mr. DAWSON. Mr. Chairman, you raised a good question earlier about, are we mitigating, and have we seen mitigation, successful creation of wetlands——

Senator CHAFEE. In connection with this discussion, when we use the word "mitigation," why don't we use it in reference to the creation of new wetlands. I recognize that mitigation has been successful in the steps that Mrs. Wilson indicated before, but what I am really thinking about is the attempt to create a new wetland, whether it is in a gravel bank or wherever.

Mr. DAWSON. Certainly, there are a lot of other mitigation tools, but focusing on that which is quite appropriate, there have been successful creations of wetlands all over the country, and our Wa-

terways Experiment Station in Vicksburg has literally stacks of technical reports about the creation of wetlands. So it is a tool.

The follow up issue that you have identified is when is it an appropriate tool to be used. The Army considers mitigation throughout the permit application evaluation process, and we have a policy that mitigation for project impacts can be included as a way to reduce the net adverse impact of the proposal, or any alternative being considered prior to determining the least environmentally damaging practicable alternative.

Mitigation is encouraged throughout the 404(b)(1) guidelines, and the guidelines do not, in our judgment, preclude the consideration of mitigation before selection of the least damaging practicable alternative. The point of all of that, I believe, Mr. Chairman, is that mitigation in the sense that you and I are using it now can be a useful tool to allow the applicant to do what he or she wants to do with their property, but at the same time ensure that there is no loss to the environment. To that extent, I think, it ought to be encouraged, not as a means to destroy wetlands or to diminish the environmental habitat, but it is a useful tool.

If stopping development is not the objective, but rather to ensume the safeguarding of the environment, I believe that this kind of mitigation is or can be in certain circumstances, and I agree that it needs to be carefully looked at by both EPA and the Army, but it can be a useful tool.

Senator CHAFEE. I think that we have a point of conflict here. Mrs. Wilson would put the mitigation as a last resort. As you describe it, that would not be your policy.

Mr. DAWSON. Not necessarily as the last resort. I think as a last resort is certainly an appropriate use, Mr. Chairman, but I think, again, in the real world of processing these 12,000-plus applications a year, what as a practical matter happens is mitigation becomes a possible factor almost from the beginning.

It still has to meet the final public interest review test, and it still has to satisfy EPA's 404(b)(1) guidelines, and measure up to all the tests, but to me it is not as important at what precise point in the process, a very difficult process, we try to prescribe that the corps begin to think about it, or EPA begins to think about it. What is important, it seems to me, is what is the injury to the environment, and there, I think, the record is extremely good, the fact that the corps has used mitigation now, to talk about it in the broader sense, very successfully to diminish the negative impacts of these applications.

Senator BURDICK. Getting back to cooperation again; I like to see cooperation. Is there any instance of any case where the corps and the EPA did not agree on a project?

Mr. DAWSON. Very few, Senator, although this one, that we have been discussing quite a bit, Mrs. Wilson may want to elaborate on, is certainly one case. But I think, when you look at the 12,000 a year, and that means roughly over 70,000 or so since we have been the steerers of this program, there have been very, very few where the whole process ended in disagreement.

Senator BURDICK. Do you agree?

Mrs. WILSON. Yes, sir. EPA has exercised its authorities under section 404(c) of the Clean Water Act a number of times, most re-

cently this past spring, with respect to the proposed filling of Sweeden's Swamp in Attleboro, MA.

I agree with Mr. Dawson that it is an infrequent occurrence. Nevertheless, there are times, infrequent as they may be, where the agencies feel so strongly that higher level review is needed, and when, due to the environmental resources impacted in an unacceptable manner, EPA feels that it must prohibit that fill, then the permit, of course, cannot be issued.

Mr. DAWSON. We certainly recognize EPA's ultimate authority to do that.

The regulations and the laws, Senator, that apply here, the CEQ regulations and the 404(b)(1) guidelines, neither of them require a sequencing. They lay out as tools the steps that can be gone through on this kind of thing, but they don't say when you have to apply them.

Senator BURDICK. Based upon your present practice, there are no great delays, there are no hangups, no confrontations. It all seems to go quite well.

Mr. DAWSON. By and large, for a program this size, I think remarkably well.

Mrs. WILSON. I might say, Senator, that in the cases where we disagree, it can be a protracted process and a difficult time for both the applicant and the agencies.

Senator BURDICK. Have there been such protracted cases?

Mrs. WILSON. I will provide those for the record, sir. Certainly, when you have higher levels of review, and intense scrutiny at different levels of Government, coordinated between two or more agencies, you can understand that the review process can take more time.

We think that with our 404(q) process, under the new memorandum of agreement, has significantly reduced the amount of time in the elevated review. In the one instance where we have triggered an elevation under the new memorandum of agreement, it was handled in an expeditious manner as the memorandum provided.

[Mrs. Wilson supplied the following additional information:]

Under section 404(c) of the Clean Water Act, EPA is authorized to prohibit or restrict the use of a wetland or aquatic site for the disposal of dredged or fill material where the agency determines that such disposal would have an unacceptable adverse effect on municipal water supplies, fisheries, shellfish or wildlife areas, or recreation areas.

One example of the exercise of the section 404(c) authority can be seen in the recent section 404(c) proceeding concerning the Sweeden's Swamp site in Attleboro, Massachusetts. That particular proceeding attracted a great deal of controversy and attention and took a good deal of time to resolve. To illustrate the time involved in resolving this matter a copy of Appendix A setting forth the chronology of the Attleboro Mall case through the Final Determination made on May 13, 1986, by Assistant Administrator for External Affairs Jennifer Joy (Manson) Wilson has been attached.

APPENDIX A

CHRONOLOGY OF ATTLEBORO MALL CASE

1982 - Proposal by the DeBartolo Corporation to construct shopping mall on Sweedens Swamp site (S. Attleboro) denied necessary state wetland permit.

1983 - State Properties rejects offer to buy Sweedens Swamp site and begins to acquire options on North Attleborough (upland) mall site.

- Pyramid Companies elects to pursue Sweedens Swamp as future mall site.

December 1983 - Pyramid Companies first contacts New England Corps and is advised that, because they are proposing to fill wetlands for their project, they will have to rebut the presumption of available alternatives.

May 1984 - EPA attends an interagency pre-application conference to discuss proposed Pyramid project.

June 1984 - EPA requests Corps to exercise discretionary authority and require an individual permit.

July 1984 - Pyramid applies for a Section 404 permit.

August 1984 - Corps, having exercised discretionary authority, issues a public notice describing project.

September 1984 - Corps holds public hearing on project. FWS submits comments objecting to issuance of the permit.

- EPA provides preliminary review comments to the Corps.

October 1984 - EPA provides full review comments to Corps, focusing upon environmental impacts, alternatives, and mitigation and indicates that project is a candidate for a 404(c) action.

- Region I Regional Administrator, Michael Deland briefed about project.

- EPA first asked by mall opponents to exercise 404(c) authority.

November 1984 - EPA, FWS, Corps, and Pyramid meet to discuss Federal agency concerns. Pyramid first proposes concept of off-site mitigation to offset habitat losses.

December 1984 - EPA writes Corps requesting additional background information contained in Corps' files.

January 1985 - EPA, FWS, and Corps meet to discuss status of project and to allow the environmental agencies an opportunity to restate their concerns.

- A consultant retained by the New England Division of the Corps reviews marketing data of Pyramid and State Properties and concludes that while the market area will not support two malls, either site is feasible for development.

- Region I EPA meets with Pyramid representatives to discuss alternatives and mitigation.

- FWS reiterates that Sweedens Swamp is valuable wildlife habitat.

February 1985 - EPA writes Corps urging that permit be denied based on noncompliance with 404(b)(1) Guidelines; EPA also questions whether project could pass Corps public interest review.

- Corps informally notifies Pyramid of imminent permit denial.

- Pyramid submits rebuttal to Corps consultant's report about alternative mall site.

March 1985 - Massachusetts issues state wetland permit after much controversy.

- Interest of outside groups increases markedly.

April 1985 - EPA sends letter to Corps detailing scientific, legal, and policy difficulties of accepting mitigation in place of proper alternatives analysis.

May 1985 - New England Division of the Corps drafts a recommendation that permit be denied and forwards documentation to Office of the Chief of Engineers (OCE).

- OCE reviews Division Engineer's draft recommendation for denial and directs that the permit be issued.

June 1985 - New England Division of the Corps issues a notice of intent to issue the permit.

- Region I participates in several meetings with the Corps and/or Pyramid to discuss case.

- Issue arises in Senate oversight hearings on 404 program.

June 1985 (cont.) - Regional Administrator meets with the Massachusetts Association of Conservation Commissions, Inc. and representatives of the Coalition to Save Sweedens Swamp, at their request.

July 1985 - Region I again meets with Pyramid representatives to discuss case.

- Regional Administrator meets with State Properties to discuss case at company's request.

- Region I initiates 404(c) action.

- Major articles and editorials in local newspapers/ television coverage.

- Pyramid authorizes site work which involves wetland illegally; Corps issues cease and desist order.

August 1985 - Region I publishes Federal Register Notice of Proposed Determination (50 FR 33835, August 21, 1985) soliciting comments on the Region's 404(c) action and announcing a public hearing.

- Pyramid sues to terminate EPA's proceeding.

September 1985 - Court dismisses Pyramid's lawsuit.

- Region I conducts a public hearing on September 26 to solicit comments on its 404(c) action. The public hearing comment period closed on October 21; over 1200 comments were received.

October 1985 - Pyramid submits a mitigation plan to the Corps; Corps schedules a public hearing for November 18 to solicit comments on Pyramid's mitigation plan.

November 1985 - Assistant Administrator for External Affairs, (AAEA) Joy Wilson, visits Sweedens Swamp site.

- Corps conducts public hearing on Pyramid's proposed offsite mitigation plan.

December 1985 - Letter writing campaign to the President on behalf of Pyramid is begun.

- Region I begins preparing Recommended Decision to be forwarded to Headquarters.

February 1986 - Pyramid files a second lawsuit against EPA, charging that the regional recommendation has been delayed improperly and seeking a declaratory judgment that the proposed determination is deemed withdrawn.

- AAEA Joy Wilson meets with Representative Arlan Stangeland on February 27.

March 1986 - EPA Headquarters receives Recommended 404(c) Determination from Region I on March 5 and the associated administrative record on March 13.

- Region I publishes Federal Register Notice of its extension of time.

- AAEA Joy Wilson conducts consultation meetings with Pyramid Companies on March 21 and March 25.

- EPA Headquarters staff meets with representatives of OCE and the Office of the Assistant Secretary of the Army (Civil Works) (ASACW) on March 27.

- AAEA Joy Wilson meets with Representative Barney Frank of Massachusetts on March 21.

- AAEA Joy Wilson meets with environmental and community interest groups on March 21.

- AAEA Joy Wilson meets with New England Development Corporation on March 26.

April 1986 - AAEA Joy Wilson conducts consultation meeting with Mr. Robert Dawson (ASACW) and other Army and Corps representatives on April 3.

- AAEA Joy Wilson meets with representatives of the State of Massachusetts and the City of Attleboro on April 4.

- AAEA Joy Wilson meets with Senator John Paul Hammerschmidt on April 17.

May 1986 - AAEA Joy Wilson makes final decision under Section 404(c).

Senator BURDICK. To summarize this, do you agree with Mr. Dawson that by and large the arrangement presently used is working?

Mrs. WILSON. As it is currently structured, it is working as well as it can in many areas. I think there are other areas where it can be significantly improved, and I outlined, Senator, in my testimony, five ways that EPA is trying to deal with the administratively difficult and complex problems of managing our responsibilities under section 404.

One key way is our work with the corps to clarify areas where we may not have agreement on interpretation. Our goal is not to issue different guidance to our respective field and regional staffs. Such procedures only insure additional clashing. We are attempting to coordinate and make consistent our guidance to our staffs and to the public.

In addition, I think that it is important that we continue work on—we are receiving the cooperation of the Corps of Engineers, Fish and Wildlife, and others—advanced analysis of certain wetland areas so that we have our analyses and evaluations done of those wetlands prior to permit applications. In this way the regulated community, the public, the localities, and the communities involved understand the wetland values involved before they apply. This will certainly help not only in the permit process, but also, we think, in the analysis of cumulative impacts and, ultimately in environmental protection.

Additionally, public information is very important. Senator Chafee mentioned in his opening statement that it is still a tremendous challenge to get the public, the local zoning officials, and local governments, to understand the values and the benefits of wetlands. All too often, we continue to hear a swamp described as a mosquito-laden dumping ground, as opposed to a wetland that provides good fish and wildlife habitat, and water quality maintenance, and flood control properties. I think that our public information effort is very important.

EPA is proceeding with revisions of our State program assumption regulations to encourage more States to assume 404 responsibilities. Last, we are increasing our commitment to research on different aspects of wetlands including evaluation of cumulative effects of wetlands losses, impacts, mitigation, and the role of wetlands in maintaining water quality, so that we can better understand this valuable resource with which we deal on a day to day basis.

Senator BURDICK. Mr. Dawson, will any of those suggestions cause any great bottleneck?

Mr. DAWSON. They should not have, Senator, although some of those are very difficult issues that have been worked on for years. But I am confident, with Mrs. Wilson's push—We didn't get the solid waste agreement done until she came on the scene—with our continued good efforts and hard push, we can resolve many of those, and perhaps all of them. We are certainly committed to do that.

Senator BURDICK. Thank you both.

Mrs. WILSON. Thank you, Senator.

Mr. DAWSON. Thank you.

Senator CHAFEE. I must say that the question here on how long it has taken to get the permits, the time and the delay, has come up several times. Clearly, it would be absolutely swift, probably not a day's delay, if we didn't have any of the program, but the purpose is not totally to reduce the time. It is nice to reduce the time, if the protection can be afforded.

The fastest way to do it is to not waste any time. You dole out the permits to anybody who comes along, but that wasn't what we passed the law for. We are not going to get this business of the time down to zero, nor should it be. I think that it is fine to work toward eliminating delays as much as possible. The word "redtape" is not the correct word to apply to the program, not that you have, but people have talked about delays. Delay is naturally going to arise when we are dealing with something as sensitive as this program, and the wetlands.

The point that I would like to get across is that in my view the EPA approach to mitigation is the better approach, because, as I understand what Mrs. Wilson said, you go to the creation of new wetlands when it is unavoidable to do otherwise.

What I would hope would not occur is that the mitigation is used as a bargaining tool right at the beginning. Somebody comes to you and says, "I will fill this swamp, but I have another place over here, and I will fix it so that you have another swamp. Now, let's just talk about other matters."

I believe the better program is to put the mitigation down far further, otherwise we are going to lose more and more wetlands, in my judgment. Do you have any reaction to that?

Mr. DAWSON. I would say this, Mr. Chairman, I believe we do need to proceed with caution. I would hope that we could submit to you some information on the creation of wetlands, and the technical attainability of that, that would give you more confidence than I believe you have in its utility as a useful tool.

I hear what you are saying about, if we use it, we had best use it when we can be certain that the result is not a destruction of wetlands betting on some uncertain way about creating other wetlands. I don't disagree with that, I think that it is a very important area, and one that we, and all of the agencies, certainly need to proceed carefully. I would be willing to work hard to make sure that, if we are using these creations of wetlands, that it is done in a way that I believe you would agree would be acceptable, and not to result in the destruction of wetlands, but in a way that would allow the applicant to do what he or she wants to do, while complying with all the environmental standards.

Senator CHAFEE. What I see is that it doesn't result in avoidable destruction. I think that a tough standard should be applied.

Senator BURDICK. Mr. Chairman.

Senator CHAFEE. Yes.

Senator BURDICK. I would like the record to show that we don't like to use that word "swamp" in North Dakota. We have potholes; we don't have swamps.

Senator CHAFEE. I have seen your potholes out there.

I have several questions here for Mrs. Wilson. In EPA's judgment, is the mitigation policy in the corps' draft final consolidated

regulation consistent with the intent and requirements for determining compliance with your 404(b)(1) regulations?

Mrs. WILSON. It is not clear to us, Senator, that it is consistent. We are preparing our written comments to the Office of Management and Budget reflecting our final review of the regulations. We are very concerned about that regulation, if it is not amended. We would like to see the mitigation section removed from the regulation so that we can implement a joint mitigation policy.

Senator CHAFEE. Do you support inclusion of the mitigation policy as it now exists in the corps' final regulation?

Mrs. WILSON. No, sir.

Senator CHAFEE. In your opinion, should the mitigation policy in the corps' final regulations be deleted until you and Army reach agreement on a joint policy?

Mrs. WILSON. That would be our preference, yes, sir.

Senator CHAFEE. If the Army succeeds in having its mitigation policy published in the final consolidated regulation, will you issue the EPA policy to provide proper guidance to your regional staff?

Mrs. WILSON. That is certainly under consideration, Senator, as a probable action.

Senator CHAFEE. Not a happy one?

Mrs. WILSON. It is not a happy contemplation because the more we go off on our separate tangents, the more we confuse the public. Moreover it gets us further away from one of our major goals, which is to establish an administratively consistent 404 Program with the environmental protections mandated in the law. So I would regretfully do it, but I think that would probably be our result.

Senator CHAFEE. That would be an unhappy result, I think.

Now you, Mr. Dawson, since you have insisted or requested that EPA not issue its policy on mitigation, and instead work with you on a joint policy, would you likewise withdraw your mitigation policy pending completion of that interagency effort?

Mr. DAWSON. Mr. Chairman, we believe that the mitigation portions of our pending regulations, which incidentally have been pending since about 1982, when this subcommittee first began this series of oversight hearings, we believe that what is contained in those consolidated regulations does nothing more than restate existing policy.

Those regulations have been proposed now, and available to your staff, and to others for going on 4 years. It has not been shown to me where we are doing anything more than giving the public a restatement of our existing policy.

I do believe that it is important that we and EPA work together to come out with a joint statement, if there are to be any changes in the mitigation policy.

Senator CHAFEE. You have just heard from Mrs. Wilson that she doesn't agree, and urges that you work it out. What is your answer to that?

Mr. DAWSON. Again, the policy stated in the consolidated regulations is not a change in current mitigation policy. It is simply not a change. We believe that the regulations should be issued, and that the public needs to know what the existing policy is, pending the

development, which we hope will proceed apace, of any desired changes in the policy.

Senator CHAFEE. If they haven't known since 1982, I don't see the urgency now.

What were you going to say, Mrs. Wilson?

Mrs. WILSON. Sir, I was going to say, EPA considers current Corps mitigation policy to not necessarily be consistent with the (b)(1) guidelines. To the degree that it may not be interpreted as consistent with the guidelines, we continue to have concerns.

Senator CHAFEE. Mr. Dawson is saying that it is consistent, and you are saying that it is not consistent.

Mrs. WILSON. I am saying, he is probably correct in characterizing what they are proposing in their consolidated regulations as consistent with what they already have on the books. However, we find both of them possibly inconsistent with the 404(b)(1) guidelines. They could be interpreted in such a manner.

Senator CHAFEE. It would seem to me to make sense, Mr. Dawson, if you have waited this long, to try and work out your differences with EPA.

Mr. DAWSON. We intend to do that, Mr. Chairman. In fact, we are already working jointly on a proposed new statement of mitigation policy.

Senator CHAFEE. Is that the way you find it, Mrs. Wilson?

Mrs. WILSON. We are continuing discussions on mitigation policy. I have not heard from Mr. Dawson, however, as to whether he will amend the mitigation policy portion of the consolidated regulation over at OMB, or whether he will sēparate and withdraw it from that consolidated regulation until our process has been concluded.

Senator CHAFEE. Mr. Dawson, it seems to me that you are in concrete on this. Where is this flexibility that you were indicating earlier?

Mr. DAWSON. Well, sir, it continues to be my belief that the mitigation policy that is in the consolidated regulations is not a change in current mitigation policy. Mrs. Wilson has said the same. She says that we may have erred in our ways in the past, and I don't agree with that, but she feels that that may have been the case under certain circumstances.

We are certainly open to further discussions with EPA about that issue. But, just as you have indicated a lack of desirability of our not changing our policy unilaterally, if we were to take any step which said that we are not supporting, or continuing to support the policy that has been in effect for years, that would be unilaterally changing in a different direction.

We are concerned, and we continue to be concerned about getting a consolidated regulation out, which is a voluminous piece, and we have this one area of apparent disagreement. Again, we will certainly continue to discuss and work with EPA on these.

Senator CHAFEE. If you are going to do that, then I don't see the point in plunging ahead. What have you got ouy there? You already have out there some mitigation policy, do you?

Mr. DAWSON. The same, we submit, Mr. Chairman, the very same policy that is in the consolidated regulations.

Senator CHAFEE. I hope that you will work with EPA on this and see if you folks can't come to a joint conclusion—Don't sell the

store, Mrs. Wilson—then we will possibly come back and see how you have done. It seems to me, in mitigation, the purpose is not to create new wetlands, it is to protect to the greatest extent possible existing wetlands. That is what the Clean Water Act is all about.

Mrs. WILSON. Senator, if I could just comment. The whole reason that we are putting such a national effort into the protection of wetlands is the very delicacy and complexity of those ecosystems. The creation of man-made artificial wetlands, of all different types of wetlands, is certainly under scientific debate, to say the least, all over the country, as to how successful they have been and whether they have really duplicated natural functions. We feel so strongly about our mitigation policy and reflecting that concern, we continue to feel that way.

Thank you.

Senator CHAFEE. I feel the same way.

I thank you both very much for coming.

Mrs. WILSON. Thank you, Senator.

[Whereupon, at 11:50 a.m., the subcommittee adjourned.]

[Statements submitted for the record follow:]

STATEMENT OF
JENNIFER JOY (MANSON) WILSON
ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
U.S. SENATE

JULY 31, 1986

Good morning Mr. Chairman. This is my first opportunity since my confirmation to appear before your Subcommittee to review the Environmental Protection Agency's Section 404 Program under the Clean Water Act. As the Agency's national program manager for the 404 program, I have come to appreciate both the challenges of the program as well as its rewards. It is challenging because decisions on Section 404 issues are often difficult ones involving a diversity of interests, complex scientific issues, and an administratively complicated regulatory framework in which the U.S. Army Corps of Engineers, EPA, the Fish and Wildlife Service and the National Marine Fisheries Service share the Federal responsibilities. It is rewarding because the course we pursue today will help to determine, in a very fundamental way, the kind of environment we leave to future generations of Americans.

While Section 404 regulates discharges of dredged and fill material into all waters of the United States, its role in the protection of wetlands engenders the most controversy. This is because decisions on the use of wetlands often involve competition among important values - growth and economic progress,

the rights of private property ownership, and the desire for clean and biologically productive waters. Accordingly, we strive to protect wetlands in accordance with the statutory requirements of the Clean Water Act, while making decisions which accommodate economic and other interests to the extent we can, consistent with our environmental mandates.

EPA has made the protection of wetlands an important Agency priority, in recognition of their contribution to the quality of our environment. The dynamic interaction of land and water that occurs in wetlands results in highly productive ecosystems serving a number of valuable environmental functions, such as providing food and habitat for fish and wildlife and improving surface water quality. Wetlands also provide many economic benefits, including commercial fishing, flood protection, and recreation.

What is critical, however, is the realization that an irreplaceable, immensely valuable resource is disappearing. The scale of the problem is, I'm sure, familiar to you. Loss rates between the mid-1950's and mid-1970's were very high -- about 500,000 acres per year. Current losses are estimated to be at least 300,000 acres of wetlands annually. Significant losses of some types of wetlands, bottomland hardwoods in the lower Mississippi Valley and prairie potholes in the upper Mid-west, for example, present major problems for waterfowl and wildlife populations, and is one factor which can lead to the placement of more species on the endangered list.

It is important that we reflect upon the underlying cause for these losses as we seek to better protect our wetlands. The lesson you will recall from Garrett Hardin's description of the "tragedy of the commons" captures the essence of the problem. Hardin explained his theory with the example of a commons used by a number of shepherds for grazing sheep. Each shepherd, evaluating his personal opportunity for gain, continues to add more sheep to the commons. Ultimately, the field is destroyed because of overgrazing, and all the shepherds suffer as a result. So it is with our nation's wetlands. They too can be considered a national commons providing a variety of services and helping to sustain the quality of lakes, streams and estuaries. Because of scientific uncertainties in assessing cumulative impacts of losses, decisions based on individual cases do not always allow us to understand the effects of wetlands destruction or alteration to our resource base as a whole, and, like Hardin's shepherds, we all stand to lose as a result. This is a problem that we, as environmental managers, must address. I view our role as protecting our water resources so we can sustain the values wetlands provide not only for immediate use, but also for the needs of the generations that will follow us.

I would like to share with you some of my observations regarding the administration of the Section 404 program. The permit process has strengths and weaknesses as a wetlands protection program. On the positive side, we can point to the reduced rate of wetlands loss in the United States, particularly coastal

waters. This reduction has resulted from prohibiting discharges that cause or contribute to significant degradation of waters of the U.S., as well as discharges that can be avoided through practicable alternatives. It has also resulted in mitigation for environmental losses from discharges.

But the permit-by-permit review approach also has limitations. As I mentioned, as an entirely reactive approach, it is difficult scientifically and as a practical matter to address the cumulative effects of the discharge with other actions that have occurred or are proposed, and to understand the significance of the discharge in the larger context of the watershed or ecosystem into which it takes place. In addition to the scientific difficulties, there are also administrative problems inherent in bifurcated responsibilities. One of the biggest problems with Section 404 is the lack of public knowledge on the values of wetlands. Therefore, EPA is making the provision of information and the fostering of public debate on the benefits and values associated with both inland and coastal wetlands a top communications priority.

How do we bring more consistent administration to the program, as it is presently structured ? EPA has a five point strategy. Those points are: (1) - taking advantage of our authority with respect to the 404(b)(1) guidelines specifically; (2) - continuing to encourage cooperative efforts between the agencies to interpret those areas where there may not be agreement such as wetlands delineation methodology, enforcement, and

mitigation; (3) - improving public information about wetlands values and federal jurisidiction; (4) - conducting research on cumulative impacts, mitigation and water quality; and (5) encouraging state assumption of the Section 404 program.

Advanced Identification

Because of the limitations of the permit-by-permit approach, EPA is pursuing with the Corps anticipatory mechanisms for protecting wetlands to supplement our role of reviewing permits. One such approach is the advanced analysis of wetlands, so as to identify specific wetlands values before permits are sought. This authority, shared with the Army Corps and the states with assumed 404 program responsibility, is described in Section 230.80 of the 404(b)(1) guidelines. The objective of advanced identification is to provide prospective permit applicants, local and state government planners with an early indication of the suitability or unsuitability of specific wetlands for various kinds of Section 404 regulated activities. It typically involves participation by local, state and other federal agencies with significant community involvement, including interest groups and concerned citizens.

Before advanced identification begins, wetlands which are valuable and vulnerable are listed by EPA regions and the states. In consultation with the community, all wetlands within a defined geographic area will be located, their boundaries delineated, and their environmental functions evaluated. The wetland areas

are assessed based on their importance to the objectives of the Clean Water Act, and a preliminary determination on the suitability of each wetland area for regulated activities is made. More specific determinations may also be used, as for example, specifying conditions for permits in wetlands suitable for discharge. The environmental criteria in the Section 404(b)(1) guidelines govern these determinations of suitability. When permit applications are received for areas where advanced identification has occurred, they are evaluated by the federal 404 agencies in terms of results of the advanced identification, and with additional information pertinent to the specific case.

The advanced identification process offers several advantages over the individual permit process. Because this process is a joint evaluation and identification effort between Army and EPA, it provides predictability to the regulated community, and the permit process will proceed more smoothly. Of course, the fundamental appeal of the advanced identification process to EPA is that it can help us to better achieve our Clean Water Act objectives by increasing knowledge on the anticipated levels of protection needed for our most important water resources. In particular, it allows for more systematic consideration of how the ecological functions of individual wetland areas interrelate on a larger scale. Cumulative impacts can be better considered, although we still need better scientific techniques to accomplish this. EPA has underway a research effort to focus on the science of evaluating cumulative impacts.

EPA is in the early stages of developing our program for advanced identification, and has initiated about a dozen such efforts across the country. We are pleased with the cooperation and support we are receiving on these projects from the Corps of Engineers, the Fish and Wildlife Service and state and local agencies. We are also encouraged by the response of interest groups, affected developers, and the public. With their support, and with yours, the use of this approach to wetlands protection will become an important part of the section 404 program.

This process will also enhance our capabilities to protect water resources. For example, as part of the Chesapeake Bay restoration program, EPA is working with the state of Virginia to find alternatives to impounding wetlands for water supply in watersheds contributing to the Bay. In North Carolina, EPA has undertaken an estuarine initiative for Pamlico and Albemarle Sounds. The pocosin wetlands of Eastern North Carolina contribute in a very important way to these estuaries, and EPA is reviewing Section 404 jurisdiction in pocosins to ensure we are adequately protecting the estuarine environment.

I would like to now turn to a number of specific developments which affect the implementation of the Section 404 program.

Memorandum of Agreement on Solid Wastes

The interim agreement between EPA and the Department of Army on the regulation of solid waste has been in effect since April 23, 1986. Historically, the Corps has regulated discharges of solid waste only if the primary purpose of such a discharge was to change the bottom elevation of waters of the United States, for example, as a fill to create developable land. However, under EPA's definition of fill material, all discharges which have the effect of fill would be regulated under Section 404, regardless of the primary purpose of the discharger. Negotiations to resolve this difference has been ongoing since the late 1970's.

The original objective in the discussions between EPA and Army to resolve this issue was to develop a common definition of fill material which would clarify whether such discharges were to be regulated under the Section 404 program or the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program. However, both agencies had concerns with taking all of these kinds of discharges within the scope of their regulatory programs. EPA and Army also recognized that the implementation of the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act may affect the manner in which solid wastes are regulated.

Given these circumstances, and with the support and direction of this Subcommittee, we agreed to an interim agreement for

addressing solid waste discharges as the first step toward an ultimate solution to this problem. The main focus of the interim agreement is to ensure an effective enforcement program against unauthorized discharges of solid wastes into waters of the United States. If either EPA or the Corps is aware of a proposed or unpermitted solid waste discharge, the agency will notify the discharger of the Clean Water Act requirements for such discharges. In line with our authorities under the Act, EPA will normally assume responsibility for initiating enforcement action, when warranted, to prevent unauthorized discharges of solid waste into regulated waters. If the enforcement proceedings raise the question of whether the discharge is regulated under the Section 402 program or the Section 404 program, the agreement provides criteria for making that determination on a case-by-case basis.

The agreement also encourages prospective dischargers to use the criteria in determining which permit would apply. Since many proposed discharges of solid wastes into waters of the United States will pose environmental problems, the agreement includes administrative steps intended to guide potential applicants toward environmentally acceptable alternatives.

Permitting of some solid and semi-solid wastes under the NPDES program, and EPA's expanded responsibilities for enforcement under the agreement, raise new regulatory issues for EPA and delegated states. To ensure these responsibilities are handled in an environmentally effective way, EPA has established

a taskforce of Headquarters and Regional staff. The initial meeting of the taskforce was held in early June, with participation by all ten EPA Regions, as well as representatives of the Army and the Corps of Engineers. Four EPA workgroups were established at that meeting to cover jurisdictional issues, enforcement, water quality criteria for wetlands, and state oversight. Each workgroup includes Regional representatives so that we can ensure our efforts to improve our regulatory program for solid wastes will work effectively in the field. In addition to these program development activities, EPA and Corps field staff have been coordinating on a number of cases involving solid waste discharges, and enforcement actions are being intiated as appropriate.

Section 404 Jurisdiction in Isolated Waters

Another issue that arose in last year's hearings held by this Subcommittee concerns isolated waters. EPA subsequently developed a list of factors to be considered in making jurisdictional determinations in isolated waters. We also issued a legal opinion providing guidance on interpreting the phrase "could affect interstate or foreign commerce" in the regulatory definition of "waters of the United States." The Department of Army has issued guidance to its field offices incorporating the same factors identified by EPA and attaching the Agency's legal memorandum. Therefore, Army and EPA are at this time operating with similar guidance on jurisdiction in isolated waters.

Most recently, the Corps of Engineers forwarded to EPA a draft of a Regulatory Guidance Letter that would provide supplemental guidance on jurisdiction in isolated waters. EPA has reviewed this guidance and we are preparing comments on it. We believe the draft guidance generally reflects EPA's legal opinion, and intend to work with the Corps to try to address any issues that are raised by our comments. If that is successfully accomplished, we propose that the guidance be issued jointly by both agencies to our respective field offices. This would be a very positive step toward a consistent interagency approach to establishing Section 404 jurisdiction in isolated waters. EPA and the Army have also been working together toward a joint scientific methodology for determining wetland boundaries. We will review the Corps' final revisions now underway to its draft multiple parameter approach methodology, and hope to integrate it with EPA's draft methodology, so a joint approach can be developed and final guidance can be issued.

Sweedens Swamp Section 404 Decision

The Subcommittee indicated interest in the EPA decision on Sweedens Swamp in Attleboro, Massachusetts. Rather than attempt to paraphrase my decision, a copy of the Final Determination document is attached for the record.

Corps of Engineers Regulation Revisions

With regard to the Corps' draft final consolidated rule for the Section 404 program, EPA continues to work with the Depart-

ment of Army on its regulatory revisions. While I will of course defer to the Department of Army to describe those changes, I would like to note that EPA has been involved in commenting on the regulations throughout the revision process. There have been discussions between EPA and Army over the last four years, and I think we look forward to the completion of the regulation nearly as much as the Army does. The Department of Army has forwarded its draft final consolidated rule to OMB, and at this time we are reviewing the draft to assess revisions made in response to EPA's most recent comments transmitted to Army by letter of April 23, 1986.

Wetlands Research

I would like to mention EPA's wetlands research. This year EPA is conducting research to address three particular areas where we believe we can make significant scientific progress. These are understanding the role of wetlands in maintaining water quality, evaluating cumulative effects of wetland losses, and assessing the effectiveness of techniques to mitigate wetland losses. Our research program was designed in consultation with the other federal agencies, so the results of our studies will complement those of the other agencies. We hope that EPA's contribution to our scientific understanding of wetlands will benefit all who make decisions affecting their use and functions.

In conclusion, Mr. Chairman, the Agency's commitment to wetlands protection is significant. We are broadening our attention

to wetlands and are increasing our focus to protect as many valuable wetland resources as we can. By working with other federal agencies, the states, the regulated sector, interest groups, and the public, we can provide better protection of the nation's wetlands for now and the future.

I will be pleased to respond to any questions that the Members may have regarding my testimony or any other Section 404 program issues.

TESTIMONY BY ROBERT K. DAWSON

ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)

SENATE OVERSIGHT HEARING ON SECTION 404

OF THE CLEAN WATER ACT

JULY 31, 1986

GOOD MORNING, MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. I APPRECIATE THE OPPORTUNITY TO BE WITH YOU TODAY TO DISCUSS THE ARMY'S REGULATORY PROGRAM.

BEFORE I DISCUSS THE FOUR SPECIFIC AREAS YOU IDENTIFIED FOR THIS HEARING, I WOULD LIKE TO REVIEW BRIEFLY THE STATUS AND BENEFITS OF THE REGULATORY REFORMS THAT WE HAVE IMPLEMENTED TO DATE UNDER THE WATCHFUL EYE OF THIS SUBCOMMITTEE.

IN GENERAL, THE REFORMS ARE DESIGNED TO ENHANCE PROGRAM MANAGEMENT, MINIMIZE DUPLICATION OF EFFORT, AND PROVIDE THE REGULATED PUBLIC WITH A REASONABLE RESPONSE IN A REASONABLE TIME PERIOD. OUR GOAL IS TO BRING ABOUT A REASONABLE DEGREE OF CERTAINTY INTO THE SCOPE OF THE PROGRAM WHILE MAINTAINING ESSENTIAL PROTECTION OF THE CHEMICAL, PHYSICAL, AND BIOLOGICAL INTEGRITY OF THE NATION'S WATERS.

THE PROGRAM IS WORKING IN A MUCH MORE EFFICIENT MANNER,

WHILE PROVIDING BETTER QUALITY DECISIONS AND STRONGER ENVIRONMENTAL PROTECTION THAN THAT WHICH OCCURRED PRIOR TO THE REFORMS. FOR EXAMPLE, THE CORPS HAS REDUCED ITS AVERAGE PROCESSING TIME FOR INDIVIDUAL PERMITS FROM 127 DAYS TO 73 DAYS. THIS HAS BEEN ACCOMPLISHED WITHOUT SACRIFICING THE QUALITY OF THE DECISIONS AS WITNESSED BY THE EXTREMELY SMALL PERCENTAGE WHICH ARE CHALLENGED IN THE COURTS.

ONE IMPORTANT EXAMPLE OF IMPROVED MANAGEMENT IS THE ENHANCED USE BY THE CORPS OF NATIONWIDE AND REGIONAL GENERAL PERMITS. ALL GENERAL PERMITS BY STATUTORY REQUIREMENT ARE FOR ACTIVITIES WHICH WILL CAUSE ONLY MINIMAL ENVIRONMENTAL IMPACTS WHEN CONSIDERED INDIVIDUALLY OR CUMULATIVELY. MORE IMPORTANTLY, WELL CRAFTED GENERAL PERMITS, BY AUTHORIZING PROJECTS WITH MINIMAL IMPACTS, FREE UP MANPOWER TO ANALYZE MORE CAREFULLY PROJECTS WITH MORE SIGNIFICANT IMPACTS. DURING THIS PERIOD OF FEDERAL AUSTERITY, ANY SAVING IN RESOURCES CONSISTENT WITH PROGRAM GOALS IS IMPORTANT.

THE CORPS REGULATORY PROGRAM IS EXTREMELY COMPLEX AND DIFFICULT TO MANAGE. THE FIELD OFFICES WITHIN THE CORPS HAVE DONE AN EXCELLENT JOB OF DEALING WITH THE TOUGH DAY-TO-DAY ISSUES THAT CONFRONT THEM. IT IS THE CORPS SUPERB PERFORMANCE AND DEDICATION THAT HAS CAUSED MANY OF THE REFORM EFFORTS TO BE SUCCESSFUL.

TWO OF THE REGULATORY REFORMS WHICH HAVE NOT BEEN

COMPLETED, BUT ARE VERY IMPORTANT TO THE PROGRAM, ARE: SIMPLIFYING THE 404(B)(1) GUIDELINES AND REVISING THE STATE TRANSFER REGULATIONS. TODAY'S HEARING WILL EXAMINE SOME OF THE COMPLICATED ASPECTS OF THE GUIDELINES. TWO ISSUES THAT WILL BE DISCUSSED LATER IN MY TESTIMONY, PROJECT PURPOSE AND NEED AND PRACTICABLE ALTERNATIVES, HAVE LONG BEEN FRAUGHT WITH UNCERTAINTY AND CONTROVERSY CONCERNING THEIR PROPER INTERPRETATION. THERE ARE A NUMBER OF EXAMPLES THAT CLEARLY SHOW THE NEED FOR THE GUIDELINES TO BE SIMPLIFIED. THE STATE TRANSFER REGULATIONS ARE ALSO IN DIRE NEED OF REVISION. AS MRS. WILSON AND I HAVE DISCUSSED, THESE STATE TRANSFER REGULATIONS SHOULD PROVIDE STATES WITH THE AUTHORITY TO ACT WITHOUT UNDUE FEDERAL INTERFERENCE. I LOOK FORWARD TO CONTINUED CLOSE COOPERATION IN THE UPCOMING MONTHS BETWEEN MY COLLEAGUE, MRS. WILSON, THE OTHER INTERESTED FEDERAL AGENCIES, AND ARMY ON THESE TWO IMPORTANT EFFORTS.

LET ME NOW TURN TO THE FOUR ISSUES FOR TODAY'S HEARING.

THE ARMY AND EPA HAVE MADE SUBSTANTIAL PROGRESS TOWARDS PROVIDING PROPER AND EFFECTIVE REGULATION OF DISCHARGES OF SOLID WASTE INTO WATERS OF THE UNITED STATES. AN MOA WHICH DEFINES THE RESPECTIVE ROLES OF OUR AGENCIES IN REGULATING SOLID WASTE WAS JOINTLY SIGNED IN JANUARY OF THIS YEAR. THE MOA BECAME EFFECTIVE ON APRIL 23RD AND IS BEING ACTIVELY IMPLEMENTED IN THE FIELD. THE ARMY WILL CONTINUE TO MONITOR

THE USE OF THE MOA AND SEEK A RESOLUTION TO ANY PROBLEMS THROUGH MUTUAL EFFORT WITH EPA.

THE MOA REPRESENTS ONLY AN INTERIM ARRANGEMENT BETWEEN THE ARMY AND EPA FOR CONTROLLING DISCHARGES OF SOLID WASTE INTO U.S. WATERS. IN THE LONGER TERM, THE AGENCIES WILL REVISE THE PROCESS BASED ON THE ONGOING ANALYSIS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT.

THE MAIN FOCUS OF THE MOA IS TO ENSURE AN EFFECTIVE ENFORCEMENT PROGRAM UNDER SECTION 309 OF THE CWA. IF IT BECOMES NECESSARY TO DETERMINE WHETHER SECTION 402 OR 404 APPLIES TO AN ONGOING OR PROPOSED DISCHARGE, THE DETERMINATION WILL BE BASED UPON CRITERIA CONTAINED WITHIN THE MOA. THE MOA APPLIES ONLY TO THE DISCHARGE OF SOLID WASTE AND DOES NOT AFFECT THE REGULATORY REQUIREMENTS FOR MATERIALS DISCHARGED INTO WATERS OF THE U.S. FOR THE PRIMARY PURPOSE OF REPLACING AN AQUATIC AREA WITH DRY LAND OR OF CHANGING THE BOTTOM ELEVATION OF A WATER BODY. THE ARMY AND EPA WILL ENSURE THAT DECISIONS MADE PURSUANT TO THE MOA MEET THE REQUIREMENTS OF THE CWA, AND THAT THE MOA WILL BE IMPLEMENTED IN A MANNER THAT DOES NOT IMPOSE UNNECESSARY BURDENS ON THE REGULATED PUBLIC.

JURISDICTION OVER ISOLATED WATERS HAS BEEN CLARIFIED. AS YOU MAY RECALL, THE ARMY IMPLEMENTED THE EPA LEGAL MEMORANDUM ON THE SUBJECT LAST YEAR. A SUPPLEMENTAL

DIRECTIVE WAS LATER SENT TO THE CORPS SOUTHWEST DIVISION WHICH REQUESTED THAT IT MODIFY ALL EXISTING LOCAL GUIDANCE ON JURISDICTION OVER ISOLATED WATERS TO BE CONSISTENT WITH THE EPA LEGAL MEMORANDUM.

ONE OF THE NEW ISSUES THAT YOU WISH TO DISCUSS CONCERNS ARMY'S POLICY ON THE APPLICATION OF THE 404(B)(1) GUIDELINES. THE 404(B)(1) GUIDELINES WERE TARGETED FOR REFORM BY THE PRESIDENT'S TASK FORCE ON REGULATORY RELIEF. TWO TOPICS WITHIN THE GUIDELINES WHICH APPEAR PROBLEMATIC AND IN NEED OF CLARIFICATION ARE THE DEFINITIONS FOR PRACTICABLE ALTERNATIVES AND FOR PROJECT PURPOSE AND NEED.

SEVERAL RECENT COURT CASES HAVE PROVIDED MEANINGFUL INSIGHT INTO THE JUDICIAL INTERPRETATION OF THE GUIDELINES WITH PARTICULAR EMPHASIS ON THE TOPICS REFERENCED ABOVE (COPIES ATTACHED). THE GOVERNMENT'S LEGAL POSITION ON ONE OF THESE CASES, LOUISIANA WILDLIFE FEDERATION V. YORK (LWF V. YORK), WAS SENT TO ITS FIELD OFFICES IN FEBRUARY OF THIS YEAR WITH THE INITIAL INTENT OF PROVIDING GUIDANCE TO BE USED IN APPLYING THE GUIDELINES. AS YOU KNOW, THE GUIDANCE CONTAINED IN THE LEGAL ANALYSIS WAS LATER RESCINDED PENDING COORDINATION WITH EPA, BUT NONETHELESS, CLEARLY REPRESENTS ARMY'S POSITION.

THE DECISION BY THE FIFTH CIRCUIT COURT OF APPEALS IN LWF V. YORK REQUIRES THAT ALTERNATIVES BE PRACTICABLE TO THE

APPLICANT AND THAT THE PURPOSE AND NEED FOR THE PROJECT BE THE APPLICANT'S PURPOSE AND NEED. THIS IS NOT TO SAY THAT THE CONSIDERATION OF ALTERNATIVES MUST BE RESTRICTED TO WHAT THE APPLICANT BELIEVES TO BE THE BEST OR MOST PROFIT MAXIMIZING, BUT RATHER THAT IN ORDER TO BE A PRACTICABLE ALTERNATIVE, THE ALTERNATIVE MUST BE AVAILABLE TO THE APPLICANT AND CAPABLE OF FULFILLING THE APPLICANT'S PURPOSE AND NEED FOR THE PROJECT. THE DETERMINATION OF THE LEAST ENVIRONMENTALLY DAMAGING PRACTICABLE ALTERNATIVE REMAINS CLEARLY THE RESPONSIBILITY OF THE ARMY THROUGH THE INDEPENDENT JUDGMENT OF THE DECIDING OFFICIAL.

THE PLAIN WORDS OF THE GUIDELINES AT 40 CFR 230.10(A)(2) READ AS FOLLOWS:

> "AN ALTERNATIVE IS PRACTICABLE IF IT IS CAPABLE OF BEING DONE AFTER TAKING INTO CONSIDERATION COST, EXISTING TECHNOLOGY, AND LOGISTICS IN LIGHT OF OVERALL PROJECT PURPOSES. IF IT IS OTHERWISE A PRACTICABLE ALTERNATIVE, AN AREA NOT PRESENTLY OWNED BY THE APPLICANT WHICH COULD REASONABLY BE OBTAINED, UTILIZED, EXPANDED, OR MANAGED IN ORDER TO FULFILL THE BASIC PURPOSE OF THE PROPOSED ACTIVITY MAY BE CONSIDERED."

ADDITIONALLY, THE PREAMBLE TO THE GUIDELINES UNDER THE SECTION ON ECONOMIC FACTORS PROVIDES ADDITIONAL CLARIFICATION:

> "IF AN ALLEGED ALTERNATIVE IS UNREASONABLY EXPENSIVE TO THE APPLICANT, THE ALTERNATIVE IS NOT PRACTICABLE."

THE CORPS, NOT THE APPLICANT, MAKES THE DETERMINATION AS TO WHETHER AN ALTERNATIVE IS PRACTICABLE. IN MAKING ITS DETERMINATION, THE CORPS FULLY CONSIDERS ALTERNATIVES NOT CURRENTLY OWNED BY THE APPLICANT, BUT IT MUST DO SO IN LIGHT OF THE FACTORS CITED ABOVE. IF THE APPLICANT CANNOT REASONABLY OBTAIN, UTILIZE, EXPAND, OR MANAGE AN OTHERWISE PRACTICABLE ALTERNATIVE TO FULFILL THE BASIC PURPOSE OF THE PROPOSED ACTIVITY, OR IF IT IS UNREASONABLY EXPENSIVE TO THE APPLICANT, THE CORPS WOULD NOT CONSIDER IT AS AN ALTERNATIVE FOR PURPOSES OF THE GUIDELINES.

IN LWF V. YORK, THE CORPS ANALYSIS SPECIFICALLY FOLLOWED THE GUIDELINES AND CONCLUDED "BASED ON CONSIDERATION OF COST, REASONABLE AVAILABILITY AND THE NATURE OF THE PROPOSAL ITSELF, THERE ARE NO PRACTICABLE ALTERNATIVES THAT WILL ALLOW THE APPLICANT TO ACHIEVE THE BASIC PURPOSE OF THE PROPOSED PROJECT." THE DISTRICT COURT STRONGLY SUPPORTED THIS PURPOSE-ORIENTED ANALYSIS OF ALTERNATIVES BY STATING:

"...THE CORPS IS NOT OBLIGATED TO CONSIDER THE POSSIBLE ALTERNATIVES EXCLUSIVELY WITH THE OBJECT OF LESSENING ENVIRONMENTAL IMPACTS, BUT RATHER IT MUST TAKE INTO ACCOUNT THE OBJECTIVES OF THE APPLICANTS' PROJECT. THE APPLICANTS' GOALS OF INCREASED SOYBEAN PRODUCTION AND INCREASED RETURN ON INVESTMENT ARE RECOGNIZABLE OBJECTIVES AGAINST WHICH ALTERNATIVES MAY BE CONSIDERED."

THE U.S. COURT OF APPEALS AGREES WITH THIS POSITION AND ADDED THE FOLLOWING:

"UNDER THESE GUIDELINES, THEREFORE, NOT ONLY IS IT PERMISSIBLE FOR THE CORPS TO CONSIDER THE APPLICANT'S OBJECTIVE; THE CORPS HAS A DUTY TO TAKE INTO ACCOUNT THE OBJECTIVES OF THE APPLICANT'S PROJECT.[15] INDEED, IT WOULD BE BIZARRE IF THE CORPS WERE TO IGNORE THE PURPOSE FOR WHICH THE APPLICANT SEEKS A PERMIT AND TO SUBSTITUTE A PURPOSE IT DEEMS MORE SUITABLE."

IN MY JUDGMENT, ARMY'S POSITION CONCERNING PRACTICABLE ALTERNATIVES IS PROPER AND HAS BEEN CONSISTENTLY SUPPORTED IN THE COURTS. THE FOLLOWING EXAMPLES ARE ACTUAL PERMIT CASES THAT ILLUSTRATE THE TOUGH DECISIONS THAT THE CORPS MUST MAKE REGARDING PRACTICABLE ALTERNATIVES AND DEMONSTRATE THE REASONABLENESS OF ARMY'S POSITION.

A. THE INDIANA PORT COMMISSION APPLIED FOR A PERMIT TO PLACE FILL FOR THE CONSTRUCTION OF A PORT ON THE OHIO RIVER ACROSS FROM LOUISVILLE, KENTUCKY. OPPOSITION TO THE PERMIT ARGUED THAT A PORT COULD BE BUILT IN KENTUCKY WITH LESS IMPACT ON THE AQUATIC ECOSYSTEM. THE ALTERNATIVE OF BUILDING A PORT IN KENTUCKY WAS CLEARLY NOT AN ALTERNATIVE AVAILABLE TO THE INDIANA PORT COMMISSION. TO PROVE THERE IS NO ALTERNATIVE ON THE KENTUCKY SIDE OF THE RIVER WITH LESS AQUATIC IMPACT OR FOR THAT MATTER IN OTHER STATES UP AND DOWN THE RIVER WOULD BE AN IMPOSSIBLE TASK. THE CORPS VERY APPROPRIATELY LOOKED AT OTHER SITES IN INDIANA WHERE THE PORT COMMISSION COULD HAVE BUILT A PORT. IT ALSO CONSIDERED THE FACT THAT A PORT COULD AND MIGHT BE BUILT ACROSS THE RIVER IN THE OVERALL PUBLIC INTEREST REVIEW. HOWEVER, THIS CONSIDERATION, UNLIKE THE GUIDELINES, WAS NOT A PASS-FAIL TEST. THE PERMIT WAS GRANTED WITH CONDITIONS TO MINIMIZE AQUATIC IMPACTS.

B. THE DOMINION COAL COMPANY WAS GRANTED A PERMIT TO FILL APPROXIMATELY A FOUR-ACRE RECTANGULAR SLIP OFF THE JAMES

RIVER AT NEWPORT NEWS, VIRGINIA, TO CONSTRUCT A COAL EXPORT FACILITY. COMPLIANCE WITH THE GUIDELINES WOULD HAVE BEEN IMPOSSIBLE TO ESTABLISH IF IT HAD TO BE DEMONSTRATED THAT ALTERNATIVES FOR HANDLING COAL BY ANYONE AT ANY LOCATION DID NOT EXIST. IF THE GUIDELINES ALTERNATIVE TEST WENT BEYOND THE APPLICANT'S CAPABILITIES, THE APPLICATION WOULD HAVE BEEN DENIED AS SOON AS A SUITABLE LOCATION FOR EXPORTING COAL WAS FOUND IN BALTIMORE OR PHILADELPHIA WITH LESS ADVERSE IMPACT ON THE AQUATIC ECOSYSTEM. REASONABLE ALTERNATIVES NOT AVAILABLE TO THE APPLICANT SUCH AS ENLARGING EXISTING TERMINALS IN THE IMMEDIATE VICINITY WERE CONSIDERED IN THE OVERALL PUBLIC INTEREST EVALUATION.

C. THE PINE BLUFF WASTEWATER UTILITY COMPANY HAS APPLIED FOR A PERMIT TO EXPAND ITS SEWAGE TREATMENT FACILITY INTO A WETLAND FOR THE CITY OF PINE BLUFF, ARKANSAS. IN ITS PUBLIC INTEREST REVIEW, THE CORPS HAS EXPLORED NINE ALTERNATIVES FOR REDUCING WETLAND IMPACTS. IF THE APPLICANT OR THE CORPS WERE REQUIRED TO ESTABLISH THAT ALTERNATIVES ARE NOT AVAILABLE TO ANY ENTITY AT ANY LOCATION IN THE PINE BLUFF VICINITY IN ORDER TO SHOW COMPLIANCE WITH THE 404(B)(1) GUIDELINES, IT WOULD BE VIRTUALLY IMPOSSIBLE TO COMPLETE THE EVALUATION OF THE APPLICATION OR TO ISSUE A PERMIT. MEANWHILE, A NEEDED PUBLIC FACILITY (EPA HAS ISSUED FOUR ORDERS TO THE CITY TO IMPROVE ITS SEWAGE TREATMENT) COULD NOT PROCEED.

D. MOBIL OIL COMPANY HAS APPLIED FOR A PERMIT TO DAM A CREEK IN COLORADO FOR WATER SUPPLY TO FACILITATE AN OIL SHALE MINING OPERATION. IN DETERMINING COMPLIANCE WITH THE GUIDELINES, THE CORPS WILL CONSIDER OTHER PRACTICABLE ALTERNATIVES AVAILABLE TO MOBIL WHEN SELECTING THE LEAST DAMAGING PRACTICABLE ALTERNATIVE. TO LOOK AT ALL ALTERNATIVES AVAILABLE TO ANYONE FOR THE ULTIMATE SUPPLY OF ENERGY WOULD BE A NEVER ENDING PROCESS. THE CORPS WILL CONSIDER ENERGY NEEDS IN ITS ULTIMATE PUBLIC INTEREST DECISION BUT WILL NOT ANALYZE EVERY CONCEIVABLE ALTERNATIVE TO PROVE THAT NONE EXITS WITH LESS IMPACT TO THE AQUATIC ECOSYSTEM.

THE SUBCOMMITTEE ALSO ASKED THAT WE REPORT ON THE STATUS OF THE CONSOLIDATED RULE FOR THE CORPS OF ENGINEERS REGULATORY PROGRAM. I SUBMITTED THE RULE TO THE OFFICE OF MANAGEMENT AND BUDGET (OMB) ON JULY 2, 1986, FOR ITS REVIEW AND APPROVAL. ALTHOUGH ALL PROVISIONS IN THE RULE HAD BEEN SUBJECT TO APPROPRIATE RULEMAKING AND AGENCY COMMENT, I DECIDED TO SEND THE RULE TO EPA, DEPARTMENT OF THE INTERIOR, AND DEPARTMENT OF COMMERCE FOR ONE LAST REVIEW IN APRIL OF THIS YEAR. AS A RESULT, BOTH EPA AND DOI PROVIDED SEVERAL COMMENTS ON THE CONSOLIDATED RULE. THESE COMMENTS WERE VERY HELPFUL AND WE HAVE INCORPORATED MANY OF THEM IN THE FINAL RULE.

THE CONSOLIDATED RULE IS A COMPILATION OF THE 1982

INTERIM FINAL RULE, THE 1984 FINAL RULE, THE NATIONAL FISHERY ENHANCEMENT ACT OF 1984, AND SOME PROVISIONS OF THE 1983 PROPOSED RULE. THE CONSOLIDATED RULE INCLUDES MANY REFINEMENTS OF SIGNIFICANT BENEFIT TO THE CORPS REGULATORY PROGRAM (SUMMARY ATTACHED) AND THREE VERY IMPORTANT IMPROVEMENTS WHICH ARE NOT INCLUDED IN THE 1982 OR 1984 REGULATIONS.

THE MOST SUBSTANTIAL CHANGES IN THE CONSOLIDATED REGULATION OCCUR IN 33 CFR 330 ENTITLED "NATIONWIDE PERMITS." (SEE TAB 2, PAGE 5-7) CONGRESS, THE PREVIOUS ADMINISTRATION, AND THIS ADMINISTRATION HAVE RECOGNIZED THE IMPORTANCE OF THE NATIONWIDE PERMITS TO HAVING AN EFFICIENT AND MANAGEABLE PERMIT PROGRAM. THERE ARE NO NEW NWP'S IN THE CONSOLIDATED REGULATION; HOWEVER, THEY HAVE BEEN CLARIFIED IN SOME INSTANCES AND BEEN FURTHER CONDITIONED FOR A GREATER LEVEL OF ENVIRONMENTAL PROTECTION. ADDITIONALLY, WE HAVE WORKED HARD WITH THE STATES TO INSURE THAT THE NWP'S COMPLY WITH STATE WATER QUALITY STANDARDS AND ARE CONSISTENT WITH THE VARIOUS COASTAL ZONE MANAGEMENT PLANS.

ANOTHER IMPORTANT IMPROVEMENT IN THE CONSOLIDATED RULE IS THE ADDITION OF A MITIGATION POLICY. THIS POLICY STATEMENT DRAWS TOGETHER EXISTING CORPS POLICY FOR MITIGATION IN THE REGULATORY PROGRAM. THE POLICY STATEMENT PROVIDES THAT MITIGATION WILL BE REQUIRED WHEN NEEDED TO MEET A LEGAL REQUIREMENT SUCH AS COMPLIANCE WITH THE

404(B)(1) GUIDELINES, ENDANGERED SPECIES ACT, OR NATIONAL HISTORIC PRESERVATION ACT, OR WHEN NECESSARY TO ASSURE THAT A PROJECT IS NOT CONTRARY TO THE PUBLIC INTEREST. ADDITIONAL MITIGATION MAY ALSO BE ADDED AT THE REQUEST OF THE APPLICANT. AGAIN, I STRESS THAT THIS MITIGATION POLICY IS A COMPILIATION OF EXISTING CORPS POLICY FOR MITIGATION IN THE REGULATORY PROGRAM AND IS CONSISTENT WITH THE CWA, INCLUDING THE 404(B)(1) GUIDELINES.

NEXT, IS A PROVISION FOR A SHORT FORM SECTION 404 PROCESS FOR ROUTINE, NON-CONTROVERSIAL PROJECTS FOR WHICH A GENERAL PERMIT HAS NOT BEEN DEVELOPED. WE HAVE MODELED THE PROCESS AFTER EXISTING ABBREVIATED PERMIT PROCESSING PROCEDURES. WHILE WE HAVE LABELED IT A 404 LETTER OF PERMISSION (LOP), IT IS IMPORTANT TO NOTE THAT IT IS NOT THE SAME AS THE SECTION 10 LOP. THE SECTION 10 LOP ALLOWS A DISTRICT ENGINEER BROAD DISCRETION IN DETERMINING THE EXTENT OF COORDINATION. RATHER, THE 404 LOP WILL BE FOR SPECIFICALLY IDENTIFIED TYPES OF ACTIVITIES WITH MINOR IMPACTS WHICH ARE GIVEN FULL PUBLIC NOTICE AND OPPORTUNITY FOR PUBLIC HEARING. FURTHER, EACH INDIVIDUAL LOP WILL BE FULLY COORDINATED WITH THE RESOURCE AGENCIES. MOREOVER, THE CORPS WILL LIMIT DEVELOPMENT OF THE 404 LOP FOR TYPES OF ACTIVITIES WHICH THEIR EXPERIENCE INDICATES HAVE GENERATED LITTLE OR NO PUBLIC COMMENT OR CONCERN BY THE RESOURCE AGENCIES. THE SECTION 404 LOP DOES NOT OBVIATE THE NEED FOR STATE WATER QUALITY CERTIFICATION AND COASTAL ZONE

CONSISTENCY CONCURRENCE.

THE GENERAL PUBLIC, AS WELL AS THE REGULATED PUBLIC, WILL BENEFIT FROM THE PUBLICATION OF THE CONSOLIDATED RULE. THE CONSOLIDATED RULE WILL PLACE ESSENTIALLY ALL OF THE ARMY'S POLICIES IN ONE CONVENIENT LOCATION. IT WILL ALSO CONTINUE THE EFFORTS WE HAVE MADE TO PROVIDE A MORE TIMELY AND CONSISTENT ANSWER TO THE REGULATED PUBLIC WHILE ENSURING ENVIRONMENTAL SAFEGUARDS.

THIS CONCLUDES MY PREPARED REMARKS.

ATTACHED COURT CASES

- Louisiana Wildlife Federation v. York
- Hough v. Marsh
- National Audubon Society v. Hartz Mountain Development Corporation
- 1902 Atlantic Ltd. v. Hudson

SUMMARY OF CHANGES TO CONSOLIDATED REGULATION

The Corps "consolidated" regulation which is being reviewed at OMB is the final culmination and consolidation of several rulemaking exercises which began with the Clean Water Act amendments of 1977. The Corps proposed regulation to implement those amendments in September 1980 and adopted the interim final regulation on July 22, 1982. The consolidated regulation will finalize the interim regulation. Additionally, the consolidated regulation will: Implement provisions of the National Fishing Enhancement Act of 1984 for artificial reefs; adopt some of the regulatory reform measures proposed in May 1983; incorporate the October 5, 1984, final regulation issued pursuant to the settlement agreement reached in National Wildlife Federation v. Marsh; and clarify, not change, several ambiguous provisions in the existing regulation.

Before discussing the major provisions of the consolidated regulation, we should first briefly mention the most controversial changes which were proposed in May 1983 but not adopted. We did not reduce the normal time for States to issue, deny, or waive Section 401 water quality certifications to 30 days. It will remain at 60 days. We did not adopt the proposed Section 404 Letter of Permission (LOP). However, we have provided for an abbreviated 404 permit evaluation procedure for identified minor 404 activities. We did not adopt the proposed change to the definition of general permits. The term will not be broadened and remains the same as in the 1982 regulation. In an attempt to clarify the geographic scope of our jurisdiction, we had proposed to change the

definition of "adjacent" and add new terms for "inundation," "saturated," "prevalence," and "typically adapted." This proposal will not be adopted. However, we will continue to work with EPA to clarify the scope of Section 404 jurisdiction. We are putting all of the provisions of the regulation which relate to jurisdiction in one section and we hope to develop, with EPA's concurrence, a wetlands delineation manual. Both of these efforts should help the public to better understand the scope of our jurisdiction. We also did not adopt the two proposed new nationwide permits.

The following is a discussion of the major provisions of the consolidated regulation. In the context of the overall regulatory program these changes are not major. However, they are necessary to comply with the directives of the Presidential Task Force on Regulatory Relief and reduce regulatory burden on the public while maintaining environmental safeguards.

In several parts of the regulation various provisions have been integrated to implement the National Fishing Enhancement Act (NFEA). In particular 33 CFR 322.5(b) requires that artificial fishing reefs comply with the standards required by NFEA and consistent with the National Artificial Reef plan developed by the Secretary of Commerce. This change is necessary to ensure a consistent, safe, and reasonable approach to the development and permitting of artificial reefs in our Nation's waters.

In 33 CFR 320, three policy statements are being added on "environmental benefits," "economics," and "mitigation." These three

statements are consistent with the way the existing program is being run. However, they are needed to clarify these issues and ensure consistency in their application on a nationwide basis. Briefly, in "economic benefits" we indicate that economic benefits must be considered in the public interest decision; in "economics" we generally assume that private industry makes the appropriate marketplace analysis, which is not our role, but we will look at the need for the project in appropriate cases; and, in "mitigation" we clearly state our existing policy and clarify the provisions of 33 CFR 325.4 pertaining to mitigation. The language currently in 33 CFR 323.4 was developed as part of the settlement agreement in NWF v. Marsh. This policy statement is the most controversial. EPA, FWS and the Army have different opinions as to what the appropriate mitigation policy should be for the Corps permit program. However, this rule is not the place to address that issue. We are merely restating existing policy. However, EPA and FWS suggest that we change our policy. Such an approach would require rulemaking. We are not opposed and would welcome the opportunity to work with EPA and FWS and to seek public input into the development of a mitigation policy through the Federal Register rulemaking process. In the meantime, the public deserves a clear statement of the existing Corps policy on mitigation. In the comments on the mitigation policy contained in the May 1983 proposed regulation, there was one thing that all the commenters, both pro and con, could agree on - the need for a clear statement of our mitigation policy.

As mentioned earlier, we had proposed a Section 404 Letter of Permission which was the same as the existing Section 10 LOP. It was limited to minor activities that were not likely to receive any comments.

Nevertheless, this proposal became highly controversial especially since there would have been no individual public notices. The consolidated regulation contains a significantly modified form of 404 LOP provision. It is an abbreviated permit processing procedure similar to some which have been developed under the existing regulation. It is not the same as the Section 10 nor the proposed Section 404 LOP. However, we are calling it a Section 404 LOP because, although the process is different, it does end in a letter permit rather than a standard permit. Before approving activities for authorization by a 404 LOP, district engineers would consult with State and Federal agencies and the public. In addition, the State would have to issue or waive a 401 certification or CZM consistency concurrence. Basically, this provision would clarify an abbreviated permit processing procedure which can be done under the existing regulation. It would be for minor activities.

Also, in 33 CFR Part 325, we are revising the permit form. The permit form has become very complex over the years. We have changed the form to make it easier for permittees to understand. General permit conditions are written in plain English and greatly reduced in number. Material which is informational in nature has been reformatted under a "Further Information" heading. We believe the revised permit form will make it easier for permittees to understand what is required of them and thus there will be more compliance with permit conditions and less need to take enforcement actions against permittees for technical but non-substantive violations of permit conditions.

A new part at 33 CFR 328 entitled "Waters of the United States" is

being added. We proposed this addition in May 1983 to clarify the scope of the Corps Section 404 jurisdiction. We had proposed several definitions to accomplish this. The purpose of these changes was to clarify, not change, the scope of Section 404 jurisdiction. However, the effect of the definitions was misinterpreted by many commenters, both pro and con, and thus did not accomplish our goal. Therefore, as mentioned above, we did not adopt these changes but are simply placing in one part of the regulation all of the provisions which pertain to the scope of jurisdiction. This will, in and of itself, provide some clarification which is sorely needed. We will continue to work with EPA to provide further clarification of the scope of Section 404 jurisdiction.

The most substantial changes in the consolidated regulation occur in 33 CFR 330 entitled "Nationwide Permits." Nationwide permits were first issued in July 1977. Later that year they were specifically provided for in the Clean Water Act amendments of 1977. Several new NWPs and changes to 33 CFR 330 were proposed in September 1980. These were adopted in July 1982, essentially as proposed. Congress, the previous Administration and this Administration have recognized the importance of the nationwide permits to having an efficient and manageable permit program. However, since they were first developed the nationwide permit program has continued to evolve. We expect it to be several more years before it reaches equalibrium.

There are no new NWPs in the consolidated regulation. All of them have been in effect since July 1982, except Nationwide Permit No. 26, which was published in the October 5, 1984, final rule that resulted from

settlement of the NWF v. Marsh lawsuit. We are, however, reissuing all of the existing NWPs, clarifying some of the NWPs, clarifying some conditions, adding new conditions, expanding discretionary authority to require individual conditions on a case-by-case basis, and implementing the 401 certification and/or CZM consistency positions of the States.

There are several changes or additions to the NWP conditions. We modified condition 3 on endangered species to ensure compliance with Section 7 of the Endangered Species Act. We modified condition 7 on wild and scenic rivers to exclude from NWP coverage Congressionally designated "study rivers." We are adding condition 9 to provide for compliance with Sections 106 and 110(f) of the National Historic Preservation Act should an activity authorized by a nationwide permit adversely affect an historic property. We are adding condition 10 to ensure that NWPs will not impair indian tribal rights. We are adding conditions 11 and 12 to inform the general permittee that in certain States he must first obtain an individual water quality certification or coastal zone management consistency concurrence or a waiver from the State. We also added condition 13 to clearly require compliance with regional conditions added by division engineers.

We are adding at 33 CFR 330.8 a provision which allows district or division engineers to add activity specific conditions to nationwide permits on a case-by-case basis. This will provide further assurances that nationwide permitted activities will have minimal effects on the aquatic environment. In this section we also delegated from the Chief of Engineers to the division engineers the authority to require individual permits for

categories of activities or specific geographic areas. This will allow the division engineer to be more responsive to concerns for the aquatic environment.

One of the most controversial issues we have had with some States over our rulemaking of the last few years has been Section 401 certification and CZM consistency of the nationwide permits. The States' positions range from no concern about any of the NWPs to denial or conditional 401 certification and/or CZM consistency concurrence or nonconcurrence. In 1984, we provided all the States the opportunity to again revise their position on 401 certification or CZM concurrence of the NWP activities. Most of the States have taken a position. A few States have indicated they need to wait and see the final regulation before they can take a final position. This is the main reason we plan to publish the rule with a 60-day delayed effective date. During this period all of the States will be given the opportunity to revise their position on 401 certification and/or CZM concurrence. A few States for a few NWPs have denied 401 water quality certification, indicating that the activities do not comply with State water quality standards, or nonconcurred in CZM consistency, indicating that the activities are not consistent with their approved CZM plan. In those situations, we will deny without prejudice those activities in those States. If individuals want to do those activities, they would first have to obtain an individual certification, concurrence, or waiver from that State. The NWP program has too many uncertainties associated with it. The consolidated regulation is needed to remove many of those uncertainties, to establish a more reasonable program and to implement the States' positions on 401 certification and CZM concurrence.